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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 198

THE UNITED STATES OF AMERICA,
Appellant

v.

SOUTH BUFFALO RAILWAY COMPANY, BETHLEHEM STEEL COMPANY AND BETHLEHEM STEEL CORPORATION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

BRUCE BROMLEY,
Attorney for Appellees.

HOYT A. MOORE,
BRUCE BROMLEY,
GEORGE M. BILLINGS,
FRANK M. MCGARRY,
Of Counsel.

January 26, 1948

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THE UNITED STATES OF AMERICA,
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SOUTH BUFFALO RAILWAY COMPANY, BETHLEHEM STEEL COMPANY AND BETHLEHEM STEEL CORPORATION

No. 198

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

Opinion Below

The opinion of the District Court is reported: 69 F. Supp. 456.

Jurisdiction

This is an action in equity, brought by the United States[1] under the Commodities Clause of the Act of June 29, 1906, as amended (34 Stat. 585; 36 Stat. 547; 49 U. S. C. Sec. 1(8)), to enjoin the appellee, South Buffalo

[1]The action was brought in the District Court of the United States for the Western District of New York on June 4, 1943.

Railway Company,[2] from transporting commodities of the appellee, Bethlehem Steel Company, and of the appellee, Bethlehem Steel Corporation and its subsidiaries, in alleged violation of said Clause. Final judgment dismissing the action upon the merits was entered on March 28, 1947 (R. 923). Petition for leave to appeal to this Court was filed and allowed on May 26, 1947 (R. 927). This Court noted probable jurisdiction on October 13, 1947 (R. 931).

Jurisdiction to review by direct appeal the judgment so entered is conferred upon this Court by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272, 49 U. S. C. Sec. 45) and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. Sec. 345).

Questions Presented

This appeal presents three questions:

1. Whether ownership by the Holding Company of all the stock of the South Buffalo and all the stock of the Steel Company and the Holding Company's exercise of rights normally incident to such stock ownership necessarily produce a union of production and transportation of the kind forbidden by the Commodities Clause.

2. Whether the Trial Court's findings and determination that the Holding Company and the Steel Company do not dominate or control the South Buffalo or threaten to do

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[2]In this brief we shall generally refer to the appellee, South Buffalo Railway Company, as the South Buffalo; to the appellee, Bethlehem Steel Company, as the Steel Company; and to the appellee, Bethlehem Steel Corporation, as the Holding Company.

so, and that they have not done so since 1939, are supported by substantial evidence, and whether, in view of such findings and determination, the Trial Court's dismissal of the action upon the merits was proper.

3. Whether, assuming that for any reason a union of production and transportation has been proven to exist (presumably in the Holding Company), the case is one in which a "railroad company" transports, from one state to another, commodities "manufactured, mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have an interest, direct or indirect", within the meaning of the Commodities Clause; or whether, on the other hand, the case is one in which the Holding Company or the Steel Company, as an "owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein," within the meaning and under the explicit sanction of the Shippers Allowance Clause, section 4 of the Act of June 29, 1906, as amended (34 Stat. 590; 36 Stat. 553; 41 Stat. 488; 54 Stat. 912; 49 U. S. C. sec. 15(13).

Statutes Involved

The Commodities Clause (49 U. S. C. § 1, par. (8)):

> "§ 1, par. (8) *Transportation of commodity manufactured or produced by railroad forbidden.* It shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufac-

tured products thereof, manufactured, mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The Shippers Allowance Clause (49 U. S. C., § 15(13):

"§ 15, par. (13) *Allowance for service or facilities furnished by shipper.* If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

Statement of the Case

The Holding Company owns all or a majority of the shares of some 57 corporations engaged, for the most part, in the production of steel and the manufacture of products made of steel. The Steel Company is its principal steel manufacturing subsidiary.

The Steel Company owns and operates plants at various strategic points throughout the United States, including

plants at Buffalo, Lackawanna and Hamburg, New York. The South Buffalo performs terminal switching and inter-plant and intra-plant services for the Steel Company at Buffalo, Lackawanna and Hamburg.

The South Buffalo is a small terminal switching road,[3] situated and operating entirely within the Buffalo Switching District, where it performs terminal switching services for the Steel Company and for some 27 other industrial plants, not related to the appellees, which are located upon its lines. It does not perform any services of any sort except such terminal switching and inter-plant and intra-plant services, and it does not perform any services beyond the limits of the Buffalo Switching District. It files tariffs, which cover its switching services, with the Interstate Commerce Commission, and also with the Public Service Commission of New York. It does not participate with any line-haul railroad in any through interstate route or joint interstate rate, or receive any division of such joint or through rate[4] (R. 606-609; 344-348; Def. Ex. 1 through 8, R. 863-880). The Interstate Commerce Commission classifies it as an "S1" carrier, which the Commission defines

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[3]The South Buffalo is situated and operates entirely within a strip of land in Erie County, New York, less than six miles in length and three in breadth. It does not own any locomotives except switching locomotives nor does it own any cars, except a few used exclusively for repair work upon its own lines. None of its equipment is used by the line-haul railroads or passes beyond its point of interchange with them.

[4]The Government's statement at page 104 of its brief that South Buffalo receives "a division with line-haul carriers" and so "may exact and conceal discriminatory rates" is not supported by any record reference and is overwhelmingly disproven by all the relevant evidence. This is the first time that such a claim has been made.

as "Exclusively Switching".[5] All its stock is owned by the Holding Company.

The Government claims that the Holding Company so dominates and controls the affairs of the Steel Company and of the South Buffalo at Buffalo, Lackawanna and Hamburg, New York, that they are in reality and substance a single organization, consisting on the one hand of a steel producing branch and on the other of a railroad common carrier branch, both wholly owned and completely dominated by the Holding Company.[6]

This case differs from any heretofore brought under the Commodities Clause in two major respects:

First, no other case has ever been brought against a terminal switching road. In no other case did the railroad interest involved bulk so small, both in terms of size and character and by comparison with the manufacturing and producing interests involved. The most comparable case is *United States* v. *Elgin, Joliet & Eastern Ry. Co.*,[7] 298 U. S. 492. That defendant was and is a Class 1 railroad[8] engaged in general freight transportation, with a main line 195 miles in length (as compared with the six mile "main line" of the South Buffalo) located in two states. It leased

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[5]Interstate Commerce Commission, 58th Annual Report on the Statistics of Railways in the United States (1944), pp. 547, 550; 59th Annual Report (1945) pp. 577, 580. This is the Commission's most recent published Report on the Statistics of Railways in the United States. The complete definition is as follows: "S1—This class of companies includes all those performing switching services only, whether for joint account or for revenue."

[6]Amended Complaint, par. 21; R. 12.

[7]Referred to in this brief as the *E. J. & E.* case.

[8]That fact was disclosed by the record to this Court. See also 59th Annual Report of the Interstate Commerce Commission (1945) on Statistics of Railways in the United States, p. 555.

and operated the Chicago, Lake Shore & Eastern Railway, a terminal railroad substantially larger than the South Buffalo, which was owned by one of the E. J. & E.'s co-subsidiaries. The Chicago, Lake Shore & Eastern Railway was not made a defendant in that case, and its operations were not criticized by the Government.

Second, in all prior cases under the Clause the alleged acts of domination complained of were carried out consciously and intentionally by the parent corporation—the owner of the subsidiary's stock—and represented a major policy of the parent. That was true not only in the cases in which the Government was successful but in those—as for example in the *E. J. & E.* case—in which the Government was defeated. That is not true in the present case. Although this case, like its predecessor cases which dealt with the Commodities Clause, theoretically involves the Holding Company's domination of the South Buffalo, and although the Trial Court in this case found that "the Holding Company and the Steel Company" (but never that the Holding Company alone) had dominated the South Buffalo prior to December, 1939 (FF. 26, R. 914), substantially the entire record consists of proof concerning transactions involving not the Holding Company but the Steel Company. Substantially all those transactions were concerned with the business and operating relations between the Steel Company's plants at Buffalo, Lackawanna and Hamburg and the South Buffalo. Substantially all of them involved plant officials and employees of the Steel Company at Lackawanna. None of those officials or employees was associated with the Holding Company. With the possible exception of two capital contributions which the Holding Company made to the South Buffalo in 1936, for the purpose of composing tax problems under the undistributed profits

surtax provisions of the Federal Revenue Act of 1936, § 14 (FF. 25, R. 914; see 69 F. Supp. 464)—problems in which the Holding Company was interested equally with the South Buffalo—not one of the Trial Court's findings bearing upon the alleged domination of the South Buffalo in and before 1939 (FF. 26, 27, 28) involve transactions or practices to which the Holding Company was a party.[9] The record discloses the following, and only the following, transactions or matters, involving the South Buffalo, in which the Holding Company participated:

In 1933 the Holding Company sponsored the election of a single group of executive officers (other than the vice president-superintendent and the secretary-treasurer) for its seven terminal railroad companies. The purpose was to provide top-flight executives at a minimum cost to each company. The Trial Court did not find, and the evidence does not show, that the purpose or the effect thereof was to integrate the activities of the railroads with the activities of the steel-producing subsidiaries, or to subject the railroads to the supervision or control of the Holding Company.

In 1936 the Holding Company made the two capital contributions to the South Buffalo to which we have referred. The Trial Court said that "the fact of the contributions is not criticized", but that "the railroad does not

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[9] In the Trial Court's opinion (R. 900; 69 F. Supp., at p. 463) it is stated that the Comptroller of the Holding Company approved for entry a journal voucher of the South Buffalo relating to its lease of track within the plant enclosures of the Steel Company. The individual signing the voucher was an officer both of the Holding Company and of the lessor corporation. There is no evidence that he acted for the Holding Company. When that fact was pointed out to the Trial Judge, he omitted the statement from the findings of fact.

appear to have been consulted."[10] The opinion, but not the findings, states that such non-consultation indicates domination. The amended complaint, however, did not charge that the South Buffalo was not consulted concerning such contributions (R. 10), and the appellees, not being advised that any such issue was in the case, did not offer proof directed to it. They believe, moreover, that the evidence does not support the charge of non-consultation.

In 1939 the Holding Company, following an investigation, changed the South Buffalo's management and took other steps to bring to an end whatever domination or supervision of the South Buffalo had theretofore existed. The Trial Court found that the purpose was to terminate, not to continue, domination and that the steps taken were appropriate and lawful. The subject is briefed at length later.

At all times the South Buffalo has filed with the Holding Company reports necessary to permit the latter to issue consolidated balance sheets and reports to its stockholders and to public authorities. The only proven transaction of any kind between the Holding Company and the South Buffalo subsequent to 1939 relates to that subject, and consists of two letters apparently settling a disagreement between them as to what accounting data the South Buffalo need supply. The Trial Court declared the furnishing of such reports to be usual and legal, and the data called for by the letters to be appropriate.[11]

This case is not one involving common directors, or a common management. None of the directors, officers or employees of the Holding Company was ever a director,

[10] 69 F. Supp., at p. 464; compare finding No. 25, R. 914.
[11] See R. 903; 69 F. Supp., at p. 465.

officer or employee of the South Buffalo. Nor is the case one in which the Holding Company has ever attempted in any manner to control or supervise the general corporate, financial or operating policies or activities of the South Buffalo. In those respects, as the Trial Court pointed out, "far less domination or control appears than was shown in the Elgin case."[12] In fact, there is no evidence whatever in the record that the Holding Company ever dominated or supervised the activities of the South Buffalo. And there is no evidence whatever that it ever authorized or even suggested that the Steel Company do so.

Thus, if domination in fact be assumed, it is domination not by the parent and stockholder—the Holding Company—but by the co-subsidiary Steel Company, carried out, for the most part, by minor officials and employees of the Steel Company at its plants at Lackawanna. As pointed out to the Interstate Commerce Commission (at whose direction this action was brought) in the first report rendered to the Commission by its trial examiners:[13]

> "So far as the record shows, since October 1922 the Delaware corporation[14] and its predecessors, as holding companies of the South Buffalo's stock, have not demonstrated an interest greater than may be expected from a controlling stockholder for the purpose of a bona fide separate administration of the carrier's affairs. However, consideration should be given to the fact that the Delaware corporation and

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[12]69 F. Supp., at p. 463; R. 900.

[13]Report, Sheet 82; R. 69. It was upon this report that the Commission submitted the matter to the Attorney General for action. There has since been a second report of trial examiners which—doubtless because of the pendency of this action—omits all reference to the question of domination. The matter is still pending before the Commission, undetermined.

[14]The "Delaware corporation" is the Holding Company.

its predecessors also have been the holding companies of the stock of the steel company, raising the question as to whether the latter may be regarded as the agent through which is being done by indirection that which the commodities clause prohibits."

The Trial Court found (FF. 30; R. 916) that, after this Court's decision in the *E. J. & E.* case[15] was brought to the attention of the officers of the Holding Company, it "entered into an investigation" of the relations existing between the South Buffalo and the Steel Company and "ascertained" that the Steel Company "was then exercising a degree of interest in, supervision and domination over South Buffalo." The Trial Court found, further, that "the Holding Company then took steps * * * to preclude the continuation and the exercise of any degree of interest, supervision or domination over South Buffalo by the Steel Company"; that those steps were effective; that there has been no degree of domination or interference in the South Buffalo's operations or affairs since that time; and it concluded that there is not now "any threatened domination of South Buffalo * * * and * * * no probability or present danger of any recurrence of the exercise of control or domination by the Holding Company or the Steel Company over the affairs of the South Buffalo."[16]

The changes in the South Buffalo's management, brought about at that time (December 5, 1939) and continued since, consisted of the election of seven new directors to its board composed of nine members, the demotion of its former president to the position of first vice president and the election as president of an experienced electrical engi-

[15]The decision was rendered May 25, 1936; 298 U. S. 492.
[16]Trial Court's Conclusion of Law No. 9; R. 922-923.

neer, qualified to give it top-flight administrative and engineering guidance. Of the seven new directors, five were qualified Buffalo business men, none of whom previously had been associated with any Bethlehem-owned corporation, and none of whom thereafter became associated with any Bethlehem-owned corporation other than South Buffalo. The Trial Court determined, upon convincing evidence, that they have given South Buffalo competent, informed and independent management (R. 907).

In addition to the change of management thus brought about, the Holding Company advised the Steel Company that thereafter it should not intervene in the South Buffalo's affairs in any way (FF. 30; R. 916).

Concerning the period since the change of management, Government counsel were compelled to concede in the trial court "that there is 'very little tangible evidence of domination * * * subsequent to the reorganization'."[17] Actually the record does not contain any such evidence.

With respect to the relations existing between the South Buffalo and the Steel Company prior to December, 1939, the evidence is confusing, the situation is obscure, and a detailed briefing of it will not be attempted at this point. However, three facts should be noted.

First, evidence relating to that period is almost wholly documentary, consisting of about 100 letters and memoranda written during a period of over 17 years, which were collected by the Government's representatives from the files of the three appellees. They were old—all the important ones written prior to 1934. In most cases they were fragmentary. They were concerned with detailed and com-

[17] 69 F. Supp., at p. 465; R. 904.

plex transactions and relations between the South Buffalo and the Steel Company at Lackawanna years before the action. It is seldom possible to determine from them with any degree of precision what the situations were which the writers were discussing. With trivial exceptions, they were not supplemented or explained by testimony. They could not be, because in every important instance the writer was dead and no one now associated with the appellees participated in or could recall them.[18]

Second, the instances of alleged domination progressively decreased with the years, both in number and importance. Few, if any, occurred after 1933, when a single group of executive officers was elected to manage the affairs of the seven terminal railroads. To quote the opinion below:[19]

> "* * * Referring to the Elgin case, the government says 'a material part of the instances stressed by the government had taken place years ago, * * *.' That is largely so here."

Third, in spite of the lapse of time, it was generally possible to show that the incidents and situations to which the documents refer were appropriate, and that they were not evidence of domination. Again to quote the opinion below:[20]

> "* * * These Exhibits number altogether something a little upwards of 100. There is a considerable number of these which on their face do not tend to show control or are shown by their connec-

[18] As will be shown, transactions allegedly participated in by Gross, the Steel Company's general traffic manager, were actually carried out by Kemmerer (now deceased), one of his assistants.

[19] 69 F. Supp., at p. 465; R. 904.

[20] 69 F. Supp., at p. 463; R. 901.

tion to relate to conduct or acts entirely consistent with independent operations. * * *"

It may be that in a few instances, individual representatives of the Steel Company did overstep their authority, or that individual representatives of the South Buffalo looked too much to the employees of the Steel Company for advice. The organizations in which such instances would never occur in the course of 18 years would, to say the least, be unusual. But those instances, alone, do not constitute domination. They represent domination only when, by reason of their character and frequency, they evidence a policy and purpose to dominate, imposed by the parent upon the subsidiary. A comparison of the instances and examples of domination found in this case with those proven in *United States* v. *Reading Co.*, 253 U. S. 26, and *United States* v. *Lehigh Valley R. R. Co.*, 254 U. S. 255, and even in the *E. I. & E.* case, shows how far the present proof falls below the standards set by other cases.

From the standpoint of quality and character of the proof, we may compare the evidence upon which the Trial Court found that there had been no domination since 1939 with the evidence relating to the prior period, which is discussed in the preceding paragraphs. All but one[21] of the South Buffalo's nine present directors, among whom were included its president and both vice presidents (one of whom is its general superintendent) appeared and testified in open court, as did also its general agent, its assistant secretary-treasurer, its assistant general superintendent, several employees in charge of its operating, accounting and statistical departments, representatives from the traffic

[21]Sellers, Secretary-Treasurer and a director.

departments of the railroads with which it connects, and representatives of its most important customers other than the Steel Company, some of whom were competitors of the Steel Company. In addition, depositions of the Holding Company's vice president in charge of financial and legal matters, of the Steel Company's vice president in charge of traffic, of the Steel Company's general traffic manager, of the general manager, the assistant to the general manager of the Steel Company's plants at Buffalo, Lackawanna and Hamburg, and of the South Buffalo's auditor were read into the record. Every charge and contention was completely explored. The determination that domination had not existed since 1939 was in the fullest sense upon the evidence, and upon the merits.

The statement of alleged facts in the Government's brief constantly overstates, and at times completely misstates the substance of the Trial Court's findings, and of the evidence. At times that result is accomplished by formulating a statement, part of which is based upon a finding, while the balance is based upon evidence—often including evidence which the Trial Court did not accept as true—and citing such finding and such evidence as though each supported the entire statement. At other times such statement is a complete distortion of the evidence and is entirely unsupported by the finding.

A statement of the latter sort appears at page 5 of the Government's brief. The statement is that the Holding Company "*supervises and integrates* the activities of all [the Holding Company's subsidiaries] for the ultimate purpose of producing steel and steel products." No record reference follows, but at the end of the paragraph the Trial

Court's 5th and 19th findings are cited, as though supporting the entire statement. For purposes of comparison we quote in the margin those two findings.[22] They do not lend the slightest support to the statement that the Holding Company "supervises and integrates" the activities of its subsidiaries.

Again, at pages 8 and 9 of its brief, the Government states that "When the Holding Company felt it necessary to put a man in charge of railroad activities in 1931 or 1932, Kemmerer was made president of each of its seven railroad subsidiaries." The statement seems to imply that Kemmerer was placed in charge of not only the seven terminal railroads but also of the railroad plant facilities of the Holding Company's steel-producing subsidiaries. Such is not the fact. The Trial Court correctly found that "Kemmerer was president of all of the railroad companies * * *" (FF. 20; R. 913), but he also correctly pointed out that "no officer or director of Holding Corporation or Steel

[22]The findings (R. 910, 912) are as follows:

"5. The defendant Bethlehem Steel Corporation (hereinafter called the 'Holding Company') is a corporation duly organized and existing under the laws of the State of Delaware. The Holding Company owns and holds all or substantially all the stock of approximately 57 corporations."

"19. Among the Holding Company's wholly owned subsidiaries are those engaged in producing basic raw materials, such as iron ore and coal, in various states of this Country and in South America, and those engaged in transporting raw materials and finished products in oceangoing commerce and in inland waters. Production by the subsidiaries ranges from ingots and slabs of raw steel to finished products, such as ships and railway cars. The activities of the subsidiaries are primarily undertaken for the ultimate purpose of the production of steel and steel products, chiefly by the Steel Company, and the sale thereof."

Company was ever an officer or director of South Buffalo" (R. 898); and, we may add, the proof shows without contradiction that while Kemmemer was president of the subsidiary railways he was not connected in any capacity with any other Bethlehem company.

Two other facts should be noted in connection with the Bethlehem scheme of executive management.

First, the Holding Company's vice president, Mr. McMath, testified (R. 152):

> "* * * Our system of management has been, so far as the Corporation is concerned, largely to select people whom we believe to be competent to manage the activities of the various subsidiary companies, and then to let them manage them."

Second, the scheme of central control by a single executive officer in charge of a given type of activity is completely at variance with the major theory of the Government's case, which is that the local plant managers of the Steel Company's plants controlled and operated the railroad subsidiaries in the interest of, and as part of the activities of the steel plants. After these many years of investigation the Government still does not know which scheme of control it believes to have been in operation.

The Government repeats the charge, which it made also in the District Court, that (Br., p. 11) "The intermingling of trackage within the Lackawanna plant enclosure[23] was brought about by the common corporate predecessor of the Holding Company and the Steel Company on the day it acquired the properties." The Trial Court, in its opinion, states the facts as follows (R. 899-900):

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[23]The Government refers to the area west of the Hamburg Turnpike.

> "The government asserts that immediately on the acquisition of South Buffalo in 1922 Bethlehem interests began the radical rearrangement of the properties between South Buffalo and Bethlehem and a change in the set-up of the South Buffalo organization with the intermingling of the steel and railroad operations. We do not find these to be the facts though Bethlehem interests were placed in a position to control. The record discloses that prior to 1922 the South Buffalo operated tracks west of the Hamburg Turnpike under a lease from Lackawanna Steel Company. (See Industrial Railways case, 29 I. C. C. 212, decided in 1914.) How long it was so operated does not appear. However, we do know it was not in effect in 1920. The maps in evidence show the same general line-up of the railroad within the plant before and after 1922; * * *"

The Government refers to the approximately 100 letters which passed between South Buffalo and Steel Company officials between October, 1922, and 1940. To avoid duplication, we defer seriatim discussion of those letters to Point II. We would point out, however, first that during that period the South Buffalo did receive from the Steel Company, and paid it for, advice and assistance on technical problems, mainly related to engineering; second, that during such period the Steel Company performed and was paid for electrical and other construction work; and third, that much of the South Buffalo's track and some of its buildings were upon land within the Steel Company's plants,[24] which

[24]The Government incorrectly assumes (Brief, p. 10) that all the plants of the Steel Company were within the 1027 acre tract west of the Hamburg Turnpike. Such is not the fact. The Steel Company owned and operated plants and land at many other points along the South Buffalo's right-of-way; as, see plants formerly owned by Seneca Iron & Steel Company (R. 915).

it leased from the Steel Company. When the alteration or relocation of tracks or buildings within such plant areas was undertaken the Steel Company's consent was necessarily first obtained, because the preemption of additional land belonging to it was involved. While it is often difficult to determine from the Government's exhibits relating to new construction where the land involved was located it is clear that most of such land, and it is probable that all of it, belonged to the Steel Company. With the foregoing facts in mind, the meaning and the propriety of most of the Government's exhibits are apparent upon their face.

The Government makes much of the fact that Petty, president of the South Buffalo after 1939, was an engineer and not a railroad man. In doing so it entirely overlooks the physical and operational differences between a switching road operating a specialized service entirely within a small, congested, industrial area less than six miles in length and three in breadth, and a line-haul railroad, operating a freight and passenger service over a right-of-way several hundred miles in length. We believe South Buffalo's three ranking executives constitute a perfectly balanced team. Petty, an experienced engineer, by reason of his training and his experience with terminal railroad equipment largely acquired prior to his association with South Buffalo, possesses expert knowledge of the mechanical problems facing such a road (R. 236). Trageser, first vice-president, had for many years been associated with the Baltimore & Ohio Railroad prior to his employment by Bethlehem interests. He is an expert on traffic matters (R. 177, 178). Dullenkopf, second vice-president, had spent 11 years in the employ of terminal railroads before his association with South Buffalo (R. 319). He is an expert in terminal railroad management.

POINT I

OWNERSHIP BY THE HOLDING COMPANY OF ALL THE STOCK OF THE SOUTH BUFFALO AND ALL THE STOCK OF THE STEEL COMPANY, AND THE HOLDING COMPANY'S EXERCISE OF RIGHTS NORMALLY INCIDENT TO SUCH OWNERSHIP, DO NOT PRODUCE A UNION OF PRODUCTION AND TRANSPORTATION OF THE KIND FORBIDDEN BY THE COMMODITIES CLAUSE.

In the Transportation Act of 1940 Congress stated with precision the situations in which stock ownership, and the degree of corporate control which normally results from such ownership, shall be deemed to constitute control of a corporation for purposes of the Interstate Commerce Act. It did not include the Commodities Clause among them. It enacted that (49 U. S. C. § 1 (3) (b)):

> "(b) For the purposes of Sections 5, 12(1), 20, 304 (a) (7), 310, 320, 904 (b), 910, and 913 of this title, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control."

At the same time the Senate rejected a proposed amendment of the Commodities Clause under which its provisions would have been so extended as to apply to the transportation, by any "carrier by railroad and, after January 1, 1941,

* * * any carrier, other than a carrier by air", of commodities owned or produced "by or under the authority of such carrier or any subsidiary, affiliate, or controlling person of such carrier, or * * * in which such carrier, subsidiary, affiliate or controlling person has any interest, direct or indirect, legal or equitable, * * *."[1] The Senate Committee on Interstate Commerce in its report to accompany the bill, said concerning this provision: "The rewritten Commodities Clause was considered far too drastic and the subcommittee early decided against any change therein."[2] In the bill as passed by the Senate, and later by the House of Representatives, the language of the Commodities Clause remained unchanged, as it has ever since.

Situations in which stock ownership is treated as control under the Transportation Act of 1940 bear no resemblance to situations to which the Commodities Clause applies. Section 1 (3) (b) of that Act specifies nine other sections or parts thereof in which stock ownership is deemed to constitute control. First are those relating to the investigatory powers of the Interstate Commerce Commission: sections 12 (1), 20, 304 (a) (7), 320, 904 (b) and 913.

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[1]S. 2009, pp. 44-45, 76th Congress, First Session, introduced in the Senate March 30, 1939, 84th Cong. R. 3509; see also Confidential Committee Prints No. 2, dated March 18, 1939, p. 50, and No. 3, dated March 28, 1939, pp. 44-45, Sec. 12. It is set forth in full at page 100, *infra*.

[2]Senate Report No. 433, 76th Congress, First Session, May 16, 1939, to accompany S. 2009, at p. 15. The statement in its entirety is as follows:

> "Section 12. Commodities Clause.—This provision retains the Commodities Clause (Sec. 1 (8) of Interstate Commerce Act), now applicable only to railroads, in its present form. The rewritten Commodities Clause was considered far too drastic and the subcommittee early decided against any change therein."

Second are those relating to combinations and consolidations of carriers and pooling of their services and earnings: sections 5, 310 and 910. It will be observed of the three sections last named: first that they relate to the union of carrier with carrier, not of carrier with shipper; and second that they represent a policy of control by the Commission in the public interest, not of prohibition.

The Transportation Act of 1940 represents the final word and decision of Congress as to the meaning, and the scope of application of the Commodities Clause. It constitutes an explicit rejection, by Congress—with full knowledge of this Court's decisions as to the meaning of the Clause and the effect of stock ownership under its provisions—of contentions with respect to it which the Government is now urging this Court to accept.

Repeatedly since the enactment of the Commodities Clause in 1906, the Government has attempted, by recommendations to Congress for its amendment, so to extend its scope and coverage as to bring within its control situations in which transportation companies and producing companies are related through stock ownership. The attempt has never succeeded.

The Government, also, has repeatedly presented to this Court the question whether mere stock ownership produces, or results in a violation of the Clause. The Court has invariably held that it does not. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366 (decided in 1909); *United States* v. *Lehigh Valley Railroad Company*, 220 U. S. 257, and *United States* v. *Erie Railroad Company*, 220 U. S. 275 (decided in 1911); *United States* v. *Delaware, Lackawanna & Western R. Co.*, 238 U. S. 516 (decided in 1915); *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492 (decided in 1936).

Even in those cases in which the Government has had judgment the Court has affirmed the view that stock ownership alone does not produce such a union of production and transportation as the Clause forbids. It said in the *Reading* case,[3] that: "the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful under the commodities clause for the railroad company to transport in interstate commerce the products of such mining company * * *." The grounds of that decision are to be found in the proven purpose of that holding company (the Reading Company) to dominate its two subsidiaries, and the completeness with which that purpose was carried out. The Court said:

> "* * * The manner in which the stock of the three was held resulted, and was intended to result, in the abdication of all independent corporate action by both the Railway Company and the Coal Company, involving as it did the surrender to the Holding Company of the entire conduct of their affairs. * * *"

The same situation prevailed in *United States* v. *Lehigh Valley R. R. Co.*, 254 U. S. 255. That case involved a Railroad Company, a Coal Company and a Sales Company, all united through stock ownership. The Sales Company was the exclusive agent to sell the coal produced by the Coal Company under a contract which, in effect, left ownership and control of the coal with the Coal Company until the Sales Company had finally disposed of it, and so, until its transportation by the Railroad Company had been completed. This Court said that (p. 263): "the Coal Com-

[3] *United States* v. *Reading Co.*, 253 U. S. 26, 62.

pany was organized and conducted as a mere agency or instrumentality of the Railroad Company", that this was so to such an extent that concededly (p. 263) "the assets of the Coal Company are the assets of the Railroad Company", and that (p. 270) "the contract between the Coal Company and the Sales Company was a mere device to evade the Commodities Clause of the Interstate Commerce Act and therefore void * * *." *United States* v. *Delaware, Lackawanna & Western Railroad Co.*, 238 U. S. 516, involved a similiar contract-agency relation, the coal in that case being mined by the railroad and prior to transportation transferred to a subsidiary coal company under a contract which, the Court held, left in the railroad company both a property interest in, and control over the coal until its sale to third parties following its transportation. In that case also this Court said[4] that "mere stock ownership by a Railroad, or by its stockholders, in a producing company cannot be used as a test by which to determine the legality of the transportation of such Company's coal by the interstate carrier." The relief granted in the *Delaware, Lackawanna & Western Railroad* case was not directed against stock ownership, but only against "further transporting coal sold under the provisions of the contract" referred to (p. 537), and the same is true of the *Lehigh Valley Railroad* case in so far as it was based upon the Commodities Clause (pp. 270, 271).[5]

The dissenting opinion in the *E. J. & E.* case[6] also recognizes the law to be that mere stock ownership is not a

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[4]238 U. S., at p. 526.

[5]The *Lehigh Valley Railroad* case was brought and was decided primarily under the Sherman Act.

[6]The dissenting opinion in the *E. J. & E.* case is the source of the Government's contention that a carrier may have an indirect

test to determine the right of a railroad company to transport the commodities of an affiliated company, for it says (p. 505):

> "The only question for our decision is whether the complete power of the United States Steel Corporation, through stock ownership, to dominate both appellee and certain shippers over its lines, *has been exercised* sufficiently to exemplify the evil which the commodities clause was intended to prevent, and so to bring appellee within its condemnation. * * *" (Emphasis supplied).

That opinion states that the Commodities Clause (p. 506):

> "* * * is concerned with transportation of commodities by a rail carrier where the carrier and the producer and shipper are so dominated by the same interest *through the exercise* of power secured by stock ownership, as to make rebates, discriminations, attempts to monopolize and other abuses of carrier power, easy, and their detection and punishment difficult." (Emphasis supplied).

Thus in an undeviating line of decisions this Court has determined that inter-corporate stock relations standing alone do not bring about that union of production and transportation which the Commodities Clause forbids.

Nothing to the contrary was determined in *North American Company* v. *Securities & Exchange Commis-*

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interest in the commodities of a corporation affiliated with it under a common holding company. In support of that contention the dissenting opinion cites the *Reading* case. The *Reading* case, however, does not support the contention, for it says (253 U. S. at p. 61): "without splitting hairs as to where the naked legal title to the coal would be when in transit, we may be sure that it was mined and produced under the same 'authority' that transported it over the railroad."

sion, 327 U. S. 686. The Public Utility Holding Company Act of 1935 (49 Stat. 803), unlike the Interstate Commerce Act (except as provided in § 1(3)(b)) and the Commodities Clause, explicitly states that a corporation's ownership of more than a stated per cent[7] of the stock of another corporation is, prima facie, sufficient to bring the provisions of that Act into operation. To argue that the same standards of so-called control are to be applied under both statutes is in effect to deny the power of Congress, by appropriate legislation, to draw distinctions between various types of businesses or corporations and to apply prohibitions or presumptions to some which it does not apply to others. In the Public Utility Holding Company Act, Congress provided that the mere power of one corporation to control another through stock ownership was unlawful.[8] The Commodities Clause does not so provide. Basically, the argument that the same standards or degree of control must be (or, in this case, should be) applied under both statutes is the very one which in the *North American Company* case this Court rejected.

What has been said above applies particularly to the Government's argument that effective domination of a subsidiary may be achieved by staffing it with an executive personnel whose background, previously developed loyalty,

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[7] 10% of the stock under that statute.

[8] In the *North American Company* case this Court said concerning that Act (327 U. S., at pp. 710-711):

> "But if evils disclosed themselves which entitled Congress to legislate as it did, Congress has power to legislate generally, unlimited by proof of the existence of the evils in each particular situation. Section 11(b)(1) is not designed to punish past offenders but to remove what Congress considered to be potential if not actual sources of evil."

and hope of future reward assure their primary devotion to the holding company, and their operation of the railroad in its interests.[9] A holding company, of course, might achieve those results even more effectively by staffing its subsidiary with directors or officers of the holding company. Section 1(3)(b) of the Act, however, provides that "common directors, officers or stockholders, * * * a holding * * * company * * * or * * * any other direct or indirect means" shall be deemed to constitute control only for purposes of the nine sections of the Act which are enumerated in said section 1(3)(b). The most that could be said concerning the staffing of South Buffalo with an executive personnel having a Steel Company background[10] would be that it might represent an "indirect means" of exercising control.[11]

Similar considerations apply to the Government's argument that the holding-company form of inter-corporate stock relation here involved brings into play elements of actual or probable illegality which would not be present, if the stock relation had run directly between the Steel Company and the South Buffalo. Holding companies are named in section 1(3)(b). The stock relation between them and their subsidiaries represents, at most, only a "direct or indirect" means of exercising control.

The argument is open to other objections. The contention is that a holding company exists for the very purpose of exercising whatever control over its subsidiaries may be

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[9]Gov't Br., pp. 79 *et seq.*

[10]No director, officer or employee of the Holding Company was ever associated with the South Buffalo.

[11]The argument also ignores the fact that the actual power to control is vested in the South Buffalo's directors, the majority of whom do not have any Bethlehem background.

necessary to weld them into a cohesive enterprise.[12] The assumption that such a purpose is more probable when a holding company owns the stock of a producing company and of a railway than when the producing company owns the stock of the railway, or the railway owns the stock of the producing company, is obviously fallacious. Moreover, that argument, in its entirety was presented to this Court in the *E. J. & E.* case and was rejected, the Court pointing out that (pp. 500, 501):

> "* * * Evidently, this is entirely out of harmony with the reasoning advanced to support the construction of the Act adopted in *United States* v. *Delaware & Hudson Co., supra;* also in direct conflict with the above quoted language from *United States* v. *Delaware, L. & W. R. Co.*
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> "Considering former rulings, it is impossible for us now to declare as matter of law that every company all of whose shares are owned by a holding company necessarily becomes an agent, instrumentality, or department of the latter. *Whether such intimate relation exists is a question of fact to be determined upon evidence.*" (Italics ours)

The "above quoted" language from the *Delaware, Lackawanna & Western Railway* case is as follows:[13]

> "'But mere stock ownership by a railroad, or by its stockholders, in a producing company cannot be used as a test by which to determine the legality of the transportation of such company's coal by the interstate carrier. * * * For a stronger reason, it would not necessarily be illegal for the road to transport coal belonging to a corporation whose stock was

[12] Gov't Br. p. 45.

[13] 298 U. S. at p. 500, quoting from 238 U. S., at pp. 526, 527.

held by those who owned the stock of the railroad company.'"

Both arguments which the Government thus presents involve the same view of the law, namely, that "the power to exercise control" which always inheres in the ownership of stock is alone sufficient to produce a violation of the Commodities Clause, because the unlawful exercise of such power will be conclusively presumed.

In the case of the subsidiary corporation staffed by an executive personnel drawn from the ranks of its parent,[14] or of its co-subsidiary, the argument is that the executives' background, their previously developed loyalty and their hope of future reward is such as to assure their operation of the subsidiary in the parent's interest, because their primary devotion is to the parent. It is argued, in conformity with this Court's decision in the *North American Company* case, that in such a situation "lack of intervention is indecisive," because "historical ties * * * can on occasion serve as a potent substitute for the more obvious modes of control."[15] Thus the position, squarely presented, is that proof of actual intervention, being "indecisive," is unnecessary,[16] and that the method of staffing the subsidiary creates a presumption which takes the place of proof. In this case the argument assumes that such presumption is sufficiently conclusive to override the finding of the Trial Judge that there was no domination.

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[14]In the present case none of the South Buffalo's executive personnel or other employees was ever associated with the Holding Company.

[15]327 U.S., at p. 693.

[16]As has been stated, that was true in the *North American Company* case because of the provisions of the statute under which the case was decided.

Similarly, in the case of the holding company form of corporate organization, the argument is that such form of organization is intended to weld the subsidiaries into a cohesive organization. Thus again that assumed purpose is made to take the place of proof, as a presumption of domination which, as we have pointed out, must here be sufficiently conclusive to override the Trial Court's contrary determination upon the evidence.

In each case the presumption necessarily assumes—again contrary to the findings and determination of the Trial Court—that the parent desires to dominate and control its subsidiary; that such desire is sufficient to induce it to violate the law and incur the risk of the consequences of such violation; that it attempts to dominate its subsidiary; that the subsidiary's executive officers are sufficiently venal to acquiesce; and that an independent board of directors—which has nothing to gain from that course—is either acquiescent or deceived. In this case, such presumption is that the Holding Company's interest in the South Buffalo is not satisfied by the plain fact that the South Buffalo makes available to the Steel Company vital access to all the trunk line railroads entering Buffalo, that it performs efficient plant services for the Steel Company, and that its stock has developed into a valuable income-producing investment.

This Court's decision in the *North American Company* case does not justify any such assumptions. It holds merely that the holding company form of corporate organization "*can on occasion* serve as a potent substitute for more obvious modes of control", and that under the explicit provisions of the statute involved, and considering the circumstances of that case "the Commission was justified in treating North American as possessing domination over its sub-

sidiaries *or the power* to dominate them *when and if necessary*.[17] The decision and the language used are addressed wholly to the statute under review and the purpose which it expresses. In view of the language, the legislative history and the construction heretofore placed upon the Commodities Clause, they are without bearing in this case.

It is clear that Congress has never intended that stock ownership in any form shall bring the Commodities Clause into operation. Specifically, it is clear that Congress did not intend that the common ownership of the stock of a railroad company and of a producing company shall have that effect. When the Clause was under debate in the Senate,[18] Senator Tillman pointed out that its provisions "would not touch the ownership of railroads by coal companies or the common ownership of railroads and coal companies," and offered an amendment designed to obviate that supposed defect. His proposed amendment was rejected.[19] Senator Tillman then proposed a second amendment, which would have introduced into the Clause, after the words "any interest direct or indirect", the phrase "by partnership, *stock ownership*, or by any arrangement whatsoever", and that amendment, also, was rejected.[20] When, in *United States v. Delaware & Hudson Co.* (*supra*), the Commodities

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[17] 327 U. S., at p. 693.

[18] The Commodities Clause came into the law in 1906, as an amendment to the Hepburn Bill amending the Interstate Commerce Act. The Bill had been drafted and was sponsored by the Interstate Commerce Commission. The Commodities Clause was framed by the Senate and was introduced into the Hepburn Bill as an amendment, after that Bill in its first form had been passed by the House of Representatives. All the debate upon the Commodities Clause took place in the Senate.

[19] 40 Cong. R., 7011, 7012.

[20] 40 Cong. R., p. 7014.

Clause first came before this Court, it said concerning those two amendments:[21]

> "* * * Certain it is, however, that in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest, direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured, mined, produced or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected. 1906, 40 Cong. Rec. pt. 7, pp. 7012-7014. And the considerations just stated we think completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since *it cannot in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense upon the theory that a provision which was expressly excluded was intended to be included.* * * *" (Italics ours)

Two subsequent decisions of this Court: *United States v. Delaware, Lackawanna & Western R. Co.*, 238 U. S., at page 526, and the *E. J. & E.* case, 298 U. S., at page 500, refer to the proposed amendments so rejected and reiterate, in substance, the views which, in the *Delaware & Hudson Co.* case, the Court so expressed.

Immediately after this Court had rendered its decision in the *Delaware & Hudson* case (May, 1909) the Attorney General began and thereafter, for 20 years carried on before Congress an attack upon the Commodities Clause as so

[21] 213 U. S., at p. 414.

construed, with the purpose of so broadening its provisions by amendment as to bring corporations connected by stock ownership within its control. In many respects that attack parallels his attempts before this Court—including his attempt in the present case—to bring stock ownership within the control of the Clause by construction. We may take as an example the following from his Annual Report to Congress dated December 5, 1927 (pp. 26-27):

> "In recent years industrial and manufacturing corporations have acquired ownership or control of numerous railroads, comparatively small in size, but important, nevertheless, because of their strategic locations and the large volume of interstate traffic hauled by them. While operating as and enjoying all the privileges and powers of common carriers, generally speaking, these roads are but mere departments of the industrial corporations which own or control them and whose traffic is transported by them. *The statute does not forbid the ownership of the roads by corporations*, yet the evils of discrimination and preference resulting from such ownership are equally detrimental as when the carrier owns the manufacturing or producing company." (Emphasis supplied.)

That contention, which Congress did not accept, is identical in substance with contentions which the Government now makes to this Court. It is perfectly clear that the Attorney General who submitted that Report did not believe that the Commodities Clause was open to the construction for which his successor now argues.

The attempts of the Attorney General before Congress to obtain such an amendment of the Clause, like his attempts before this Court to obtain such a construction of it, were unsuccessful.

In seven of his Annual Reports to Congress between 1908 and 1928 the Attorney General attacked the Clause, as construed by this Court, upon the ground that is was ineffectual, and recommended its amendment.

In his Report dated December 10, 1909 (pp. 3, 4) after summarizing the Court's conclusions in the *Delaware & Hudson* case, he stated that under that construction the application of the Clause could be avoided by transferring mining or producing property "to a corporation, all of whose stock shall be owned or controlled by the carrier", and recommended that "Congress should amend the statute so as to make it an effectual and not an illusory prohibition or else repeal it." When the Mann-Elkins Act of 1910 was under consideration by Congress four proposals to amend the Commodities Clause to comply with that recommendation were submitted. They were not enacted.[22]

The Attorney General renewed his recommendation in his Report dated December 10, 1910 (pp. 6-7), and a bill to effectuate such amendment was introduced in the House of Representatives.[23] It failed to be enacted.

Thereafter four Annual Reports dated, respectively, December 7, 1914 (pp. 5-6), December 6, 1915 (pp. 7-8), December 4, 1916 (pp. 7-8) and December 4, 1917 (pp. 7-8) contained the recommendation, in identical language, that the Clause be amended to forbid transportation of commodities of a railroad company "or any corporation controlled by it or affiliated with it by having the same controlling stockholders. * * * On December 31, 1914, a bill designed to carry out that proposal (the Adamson Bill)

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[22]45 Cong. R. 5590-5591; 5594-5595; 7207-7208, 7218, 7251-7252 (1910).

[23]H. R. 26983, 61st Cong., 2nd Session (1910).

was submitted in the House of Representatives.[24] Upon that bill the Committee on Interstate and Foreign Commerce of the House of Representatives held a hearing, at which the Assistant Attorney General appeared and gave testimony[25] as to "why the present law does not separate transportation from production", two of the three reasons being:

> "The second reason is that it has been held that a railroad company has no interest, direct or indirect, in an article owned by a coal company whose stock in turn is owned by the railroad company, unless the railroad company has in the particular case so exerted its stock control over the coal company, so commingled the affairs of the two as to make the coal company a mere department of the railroad company. The third deficiency is that under existing law, by its terms at least, a producing or manufacturing company is not prohibited from owning and operating a railroad company. *Of course, I take it that no one desires to prohibit a manufacturing company from owning a railroad company as a mere plant facility. What I mean is that under existing law there is nothing to prevent a manufacturing company from owning what is virtually a trunk-line railroad company.*" (Italics ours)

No further action was taken upon the bill.

Again in his Report dated December 5, 1927, to which we have referred, the Attorney General renewed his recommendation.

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[24]H. R. 20470, 63rd Cong., 3rd Session (1914). A similar bill, S. 7150, was introduced in the Senate.

[25]Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, on H. R. 20470, 63rd Cong., 3d Sess., January 15, 1915, pp. 9-10. U. S. Senate Library Hearings, Volume 96, No. 5 (1915).

No amending legislation ever resulted.

The Government argues that the proposed amending legislation to which we have referred would have rendered transportation unlawful if there existed any stock relation, however small, between the railroad company and the producing company whose commodity the railroad company transported, and that Congress rejected such proposed legislation for that reason. The Government says, also[26], that "the attention of the Senate was not focused on the situation where the shipper was a wholly owned subsidiary of the railroad, or *vice versa*, or where shipper and railroad were wholly owned subsidiaries of a common parent." Neither statement is true.

Immediately before Senator Tillman offered his second proposed amendment to the Elkins Amendment (the proposed Commodities Clause which was adopted), to which the Government refers above, he had pointed out to the Senate[27]:

> "* * * that this amendment [the Elkins Amendment] would not prevent the ownership of coal properties by the ownership of stock in coal companies; that it would not prevent the control of coal companies by officials of railway companies; that it would not touch the ownership of railroads by coal companies or the common ownership of railroad companies and coal companies. * * *"

Congress has been kept constantly aware of those facts ever since, as we have shown.

Nor is it generally true that the proposed amending legislation might have rendered transportation unlawful

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[26]Gov't Brief: pp. 57-58.
[27]40 Cong. R. 7011-7012.

where any stock relation existed between carrier and shipper. For example, the Adamson Bill[28] would have forbidden the transportation only of commodities owned or produced by a railroad company or:

> "* * * by any person, firm, or corporation subject to its control, or to whose control it is subject through stock ownership or otherwise, or, third, by any corporation or association which has the same controlling shareholders or members as it has or is otherwise subject to the same control."

And the proposed Section 12[29] of the Transportation Act of 1940, likewise, would have forbidden transportation only of commodities:

> "* * * manufactured, mined, or produced by or under the authority of such carrier or any subsidiary, affiliate, or controlling person of such carrier, or any such article or commodity in which such carrier, subsidiary, affiliate, or controlling person has any interest, direct or indirect, legal or equitable, * * *"

It is futile to argue that such proposed statutes would have applied to transportation where the only relation between carrier and producer or owner consisted of a minority stock interest falling short of actual control or, in view of the reports made to Congress and the debates in Congress, that Congress rejected them on any such ground.

Thus in the *E. J. & E.* case, when the Court was urged to change its construction of the Clause respecting the

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[28] H. R. 20470 and S. 7150, 63rd Cong., 3rd Session.

[29] S. 2009 as introduced in the Senate, March 30, 1939, pp. 44-45. The proposed Section 12 is set out in full at page 100, *infra*.

effect of stock ownership because a holding company was involved, it justifiably said (298 U. S., at p. 500):

> "Notwithstanding the intent imputed to Congress by this opinion,[30] announced in 1915, no amendment has been made to the Commodities Clause. We must, therefore, conclude that the interpretation of the Act then accepted has legislative approval."

Moreover, Congress was kept fully informed of the pendency, the progress through the courts and the ultimate disposition of the *E. J. & E.* case. Each of the Reports of the Interstate Commerce Commission to Congress, beginning with the Report for 1931 and concluding with the Report for 1936[31] comments upon the case, and the last report (for 1936) clearly states the substance of this Court's decision.[32]

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[30]The Court's opinion in the *Delaware, Lackawanna & Western Railway* case, 238 U. S. 516, is referred to. The opinion states (p. 526) "that it was not necessarily unlawful for a railroad company to transport coal belonging to a corporation in which the road held stock", and that "For a stronger reason, it would not necessarily be illegal for the road to transport coal belonging to a corporation whose stock was held by those who owned the stock of the railroad company."

[31]Interstate Commerce Commission, 45th Annual Report (1931), pp. 15-16; 46th Annual Report (1932), p. 51; 47th Annual Report (1933), p. 44; 48th Annual Report (1934), p. 46; 49th Annual Report (1935), p. 53; 50th Annual Report (1936), p. 50.

[32]That Report (the 50th Annual Report) states concerning the decision (p. 50): "The Supreme Court held that (1) it was impossible for it to declare as matter of law that every company, all of whose shares are owned by a holding company, necessarily becomes an agent, instrumentality, or department of the latter; (2) whether such intimate relation exists between the two corporations is a question of fact to be determined upon evidence; and (3) the evidence failed to support the claim of the Government that the carrier must be regarded as the alter ego of its sole stockholder."

Hence in 1939, when the Transportation Act of 1940 was before Congress, that body was fully informed concerning the construction which this Court had placed upon the Commodities Clause, and concerning all the grounds, legal and economic, upon which the Government, in the present case, criticises the Clause as so construed. As shown by the reports to Congress, and more particularly by the provisions of section 1(3)(b) of the Act, Congress knew that the power of one corporation to control another through stock ownership was not sufficient to bring the Clause into operation, and that the ownership by a holding company of all the stock of a producing company and all the stock of a railroad company was likewise not sufficient to bring the Clause into operation. None the less Congress rejected as "far too drastic", an amendment of the Clause which would have placed corporations so connected through such stock inter-relations within its scope, and provided that stock ownership and the exercise of rights normally incident to such ownership should be treated as actual control only for the limited purposes specified in section 1(3)(b). In view of that fact, and of the uniformly similar history of all prior attempts to amend the Clause, the intent of Congress not to place corporations related merely through stock ownership within its control is clear by every standard available for the ascertainment of such intent. This Court, we submit, cannot now abandon a construction of the Clause so repeatedly stated in its decisions, so long maintained by it and so unmistakably approved by Congress.

Faced with such legislative, judicial and administrative history, the Government rests substantially the entire burden of its case upon the contention that "* * * Congress, in

enacting the Commodities Clause, sought to achieve genuine divorcement of the functions of interstate railroad transportation and production."[33] Only that contention gives any semblance of merit to the argument that the South Buffalo, as an owned and a completely dominated instrumentality of the Holding Company or of the Steel Company, has an "interest, direct or indirect"[34] in the commodities of those two appellees, or that the Holding Company or the Steel Company is a "railroad company" which transports such commodities from one state or territory to another.[35]

The argument that the purpose of the Commodities Clause was to bring about "a genuine divorcement of the functions of interstate transportation and production" faces many objections, particularly, where a railroad company transports the commodities of the industrial owner of its stock. It was repudiated by the three-judge District Court in the *E. J. & E.* case,[36] and the brief to this Court of the appellee in that case presents a convincing argument against it. It has been questioned, if not repudiated, by prior Attorneys General on more than one occasion. But however valid that argument may be when applied to interstate line-haul transportation, it clearly is not true in the case of terminal switching and related terminal services. For Congress, when it enacted the Commodities Clause, also enacted, in the Shippers' Allowance Clause, that "if the owner of property transported under this Act directly or indirectly renders any service connected with such trans-

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[33]Gov't Br. p. 29.

[34]Such "interest, direct or indirect" means a property interest in the commodity. *United States* v. *Delaware & Hudson Co.*, *supra*; 213 U. S., at pp. 413, 415.

[35]This subject matter is briefed at length in Point III.

[36]See *infra*, p. 100.

portation, or furnishes any instrumentality used therein," such owner shall be paid reasonable compensation by the railroad carrier for which such service is performed. Thus, it is clear that at the level of terminal services, Congress explicitly sanctioned the union of production and transportation. The legislative, the judicial and the administrative history of the Shippers' Allowance Clause all make clear that it was intended to apply to terminal services, including terminal switching, when performed by a terminal switching road owned by a shipper or consignee.[37] Hence, at least for purposes of this action and appeal, the argument based upon such supposed legislative purpose to divorce production from transportation, far from supporting the Government's case, is actually an overwhelming argument against it.

[37]Briefed, *infra*, pp. 92 *et seq.*

POINT II

THE TRIAL COURT'S DETERMINATION THAT THE HOLDING COMPANY AND THE STEEL COMPANY DO NOT DOMINATE OR CONTROL THE SOUTH BUFFALO OR THREATEN TO DO SO, AND THAT THEY HAVE NOT DONE SO SINCE 1939, IS SUPPORTED BY SUBSTANTIAL EVIDENCE. IN VIEW OF THAT DETERMINATION, THE TRIAL COURT'S DISMISSAL OF THE ACTION UPON THE MERITS WAS PROPER.

A. The findings support the judgment.

In *Walling* v. *Hardwood Co.*, 325 U. S. 419, 421, this Court said:

> "* * * While 'voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power,' *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 43, it may justify a court's refusal to enjoin future activity of this nature when it is combined with a bona fide intention to comply with the law and not to resume the wrongful acts. Cf. *United States* v. *United States Steel Corp.*, 251 U. S. 417, 445. We cannot say, therefore, that the District Court abused its discretion in refusing to enjoin the abandoned method of wage payments."

In the *Walling* case the trial court had found and determined that "the respondent had no apparent intention of resuming" the unlawful practices complained of (p. 421). In the present case the Trial Court made a similar finding and determination. The decision states (R. 922-923):

> "9. Since December 5, 1939, there has not been nor is there now any threatened domination of South

> Buffalo by the Steel Company or the Holding Company, and there is no probability or present danger of any recurrence of the exercise of control or domination by the Holding Company or the Steel Company over the affairs of the South Buffalo."

That determination is supported by important subsidiary findings which, in turn, are supported by convincing and generally uncontroverted evidence.[1]

In the *Walling* case the trial court found that there had been "no willful intention on the part of the respondent to violate the Act" (p. 421). In the present case the vice-president of the Holding Company testified that after the opinion in the *E. J. & E.* case was called to his attention (R. 123) an investigation of the relations between the Steel Company and the South Buffalo was undertaken by the Holding Company, in the course of which it developed that "prior to that time there had been some degree of control or, rather, supervision by the manager of the Steel Plant" at Lackawanna, and that "there were instances where the theory of management had, to some extent, slopped over." The Trial Court found that after the *E. J. & E.* decision came to the attention of the Holding Company's officers, the Holding Company (FF. 30, R. 916):

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[1] As we have pointed out (pages 14, 15, *supra*), the Trial Court's findings of fact relating to the period since December 5, 1939, are based upon the testimony in open court of all but one of its directors and ranking executive officers, of several of its minor executive officers and department heads, and of many other witnesses. Thus the rule applies, that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Rule 52(a), Rules of Civil Procedure for the District Courts of the United States.

> "* * * entered into an investigation of the relation and practices existing between South Buffalo and the Steel Company and ascertained that the Steel Company at Lackawanna, New York, was then exercising a degree of interest in supervision and domination over South Buffalo."

The Holding Company's vice-president further testified that, following such investigation the relations between the South Buffalo and the Steel Corporation were reviewed, and (R. 136):

> "* * * The decision reached was to have the railroad company so organized that it would be completely independent of any control or influence by the operating and other departments of the Bethlehem Steel Company, and as far as possible, completely independent of the Bethlehem Steel Corporation itself so far as its management and control went."

Instructions to that effect were given to the officials of the Steel Company at Lackawanna (R. 137, 138). The Trial Court found (FF. 30, R. 916):

> "* * * The Holding Company then took steps with the purpose to preclude the continuation and the exercise of any degree of interest, supervision or domination over South Buffalo by the Steel Company. Instructions were given to the officials of the Steel Company that thereafter no advice, instructions or assistance to the South Buffalo should be given by the Steel Company and there should be no interference by the officials of the Steel Company in the operation or management of the South Buffalo."

Thus the case is not one in which the Holding Company, as an habitual offender, abandoned unlawful practices in the

face of litigation. It is, rather, one in which the Holding Company, following this Court's restatement of the law in the *E. J. & E.* case, reviewed the relations between the Steel Company and the South Buffalo, found that apparently, at times, Steel Company officials had overstepped their authority, and took all steps necessary to eliminate that situation and to bring the corporate relations of the parties into complete conformity with the law as then construed by this Court.[2] Those steps were taken almost 4 years before the commencement of this action. The Trial Court said concerning them (R. 904) that "the evidence supports the conclusion that the reorganization as perfected in 1939 was entered into in good faith * * *."

The steps taken by the Holding Company to prevent further domination of, or interference with the affairs of the South Buffalo were clearly adequate. Both South Buffalo and Steel Company officials[3] were instructed by the Holding Company that thereafter the South Buffalo's affairs were to be conducted without benefit of advice and free from interference by the Steel Company (R. 916). The South Buffalo's executive management was completely

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[2]Thus as the Court said with respect to the Sherman Act in *Maple Flooring Ass'n* v. *United States*, 268 U. S. 563, 577:

> "We think it might be urged, on the basis of this record that the defendants, by their course of conduct, instead of evidencing the purpose of persistent violators of law, had steadily indicated a purpose to keep within the boundaries of legality as rapidly as those boundaries were marked out by the decisions of courts * * *."

[3]Petty was given to understand that he was to run the South Buffalo (R. 244) and later learned that the manager of the Steel Company's plants at Lackawanna had received instructions to keep hands off (R. 243). Petty instructs his subordinates not to consult with Steel Company officials concerning how the South Buffalo shall be run (R. 599).

reorganized. Its former president was demoted to first vice president and a new president, qualified to give it top-flight administrative and engineering guidance, was elected. Seven of its nine directors resigned and were replaced by new directors, of whom five had had no previous or other connection with any other Bethlehem company (R. 904; FF. 33, R. 917). A new chief engineer was elected (R. 597), and also a new secretary-treasurer (R. 696). A short time later Benning, for many years the South Buffalo's vice president and general superintendent and major participant in the alleged acts of domination referred to in the Government's brief, resigned and was replaced (R. 696).[4]

The fact (found by the Trial Court) that at all times since December 5, 1939, a majority of the South Buffalo's board of directors has consisted of local business men, experienced in the management of corporations, who had not had any prior or other connection with any Bethlehem corporation (FF. 33, 34, R. 917), lends strong support to the determination that no domination in the future is threatened or probable. Such outside directors are not open to any of the criticisms or alleged grounds of suspicion asserted against the South Buffalo's officers. And in spite of the contentions of the Government to the contrary[5] it is entirely clear, both in fact and law, that the directors have the power to operate, dominate and control the South Buffalo and that such ultimate power as the Holding Com-

[4] At the time of the trial none of the major participants in the transactions found to represent or to involve domination of the South Buffalo prior to December 5, 1939, and only three of the officials extensively referred to in the testimony relating to that period—Trageser of the South Buffalo and Gross and Entwisle (since deceased) of the Steel Company—were associated with any of the appellees.

[5] Gov't Br., p. 44.

pany may have to control its affairs can be exercised only through the Holding Company's power to name the members of the Board. In this case, that power has been exercised in favor of persons whose circumstances are not such as to render them subject to the Holding Company's domination or influence. The Trial Judge, who saw and heard the testimony of all five outside directors, said concerning them (R. 907; 69 F. Supp.):

> "* * * The outside directors are all of them men of business experience and most of them have been or were connected with business interests of considerable importance and volume. The ability of each member of the Board is clearly demonstrated. The Board met regularly and as is the case usually in the work of any Board of Directors, it considered and acted on all matters presented by its officers. Necessarily they depended to a large extent upon the recommendations of these officials who had direct and immediate charge of operation. Each of these outside directors testified that at no time had he any understanding with the Steel Company or the Holding Company or any of their officers or representatives as to what action should be taken by them. So far as this record discloses, each of the directors has performed his duties in the sole interest of the railroad. * * *"

The Trial Judge clearly was entitled to give substantial weight to those facts in determining whether the purpose of the Holding Company was or was not to dominate the South Buffalo, and whether such domination in the future was or was not contemplated or probable.

Finally, the Trial Judge found, not once only, but repeatedly and in many forms, that there had not been any domination since December 5, 1939 (Findings Nos. 35

through 38; 40; 47; R. 917, 918, 921), and specifically that (R. 921):

> "47. Since December 5, 1939, the officers and directors of South Buffalo have operated and carried on the business and management of the South Buffalo Railroad independent of and from the Holding Company and the Steel Company, either or both. * * *"

Thus in this case, as in *United States* v. *United States Steel Corporation*, 251 U. S. 417, 445, which this Court cited and followed on that point in *Walling* v. *Hardwood Co.* (*supra*):

> "* * * There is no evidence that the abandonment was in prophecy of or dread of suit; and the illegal practices have not been resumed, nor is there any evidence of an intention to resume them, and certainly no 'dangerous probability' of their resumption, the test for which *Swift & Co.* v. *United States*, 196 U. S. 375, 396, is cited. * * *"

The judgment is clearly supported by the findings, and clearly lay within the judicial discretion of the Trial Court.

B. There is no proof that the Holding Company ever dominated the South Buffalo.

The Trial Judge's findings of fact do not make entirely clear his views concerning the relation, if any, between the Steel Company and the Holding Company with respect to the supposed domination of the South Buffalo prior to December 5, 1939. On the one hand as pointed out, he found that after the decision in the *E. J. & E.* case had come to the Holding Company's attention it "entered into an

investigation" of the relations between the South Buffalo and the Steel Company "and ascertained" that the latter was intervening unduly in the former's management, whereupon the Holding Company "took steps * * * to preclude the continuation and the exercise" of such intervention (FF. 30, R. 916). And on the other hand, he found that prior "to about December, 1939, the Holding Company and the Steel Company in numerous ways and on numerous occasions" dominated the South Buffalo, and that "The Holding Company required officials of South Buffalo in certain instances [which the finding then enumerates] to apply to officials of the Steel Company for guidance, advice, and decisions in respect of South Buffalo's" relations to shippers and its internal management (FF. 26, R. 914).

The Trial Judge also found that the two contributions which the Holding Company made to the South Buffalo in 1936 "were decided on by the Holding Company without prior consultation with South Buffalo", that "South Buffalo's journal entry on this matter was approved by the Holding Company" (which is true), and that "South Buffalo took no part in any action leading to this [$1,900,000] contribution * * *." On the other hand, he found that "South Buffalo was advised of the purpose and the proposal" to make the contributions, and that "an officer of the defendant [obviously the South Buffalo] was advised of the general purpose of the Holding Company with respect to" the $1,900,000 contribution (FF. 25, R. 914). His opinion states that "The Holding Company had a right, as creditor and sole stockholder, to initiate the contribution proceedings and to lay down terms, but in ignoring the railroad in them, it indicates the exercise of the power of control over the railroad" (R. 903).

The foregoing are the only findings of fact which in any manner implicate the Holding Company in the alleged domination of the South Buffalo prior to December 5, 1939. Upon the basis of those findings the Trial Judge concluded that "preceding 1939, domination and control of the South Buffalo was so exercised by the Holding Company through its own activities and that [sic] of its subsidiary, the Steel Company, that the South Buffalo became thereby an agent or instrumentality or department of the Holding Company or of its subsidiary, the Steel Company" (R. 922).

Thus the findings contain two identifiable factual charges against the Holding Company:

First that "The Holding Company required officials of South Buffalo" to apply to officials of the Steel Company "for guidance, advice and decisions" in certain instances (FF. 26, R. 914).

Second that in 1936 the Holding Company did not consult South Buffalo concerning the two capital contributions made in that year (f. 25, R. 914).

Neither finding is supported by evidence.

1. *The finding that the Holding Company required the South Buffalo to apply to officials of the Steel Company for guidance and decisions.*

The record does not contain any evidence which supports any such finding.

Except for the testimony of the Holding Company's vice-president, Mr. McMath, the record is barren of evidence concerning the Holding Company's attitude toward the South Buffalo, and concerning the Holding Company's intent or understanding concerning the relations between the Steel Company and the South Buffalo prior to its investigation thereof after the decision in the *E. J. & E.*

case was brought to the attention of its officials. Mr. McMath's testimony concerning those subjects is as follows:

First, he *assumed* that the South Buffalo was receiving technical advice and some assistance, relating mainly to engineering matters, from officials of the Steel Company at Lackawanna. He testified that the South Buffalo's president (R. 123):

> "* * * made use to some considerable extent, possibly, of the organizations which Bethlehem Steel Company had for the operation of their steel plants; those plants had fully developed and well-trained organizations, engineering talent, and I guess capable of doing almost anything, and to some extent in the course of his work where there were operating problems such as the most desirable motive power, things of that kind, they could be and were a real help. * * *".

Second, he understood that the South Buffalo was not required to accept such advice. He testified (R. 126-127):

> "Q. Prior to 1939, you did expect, did you not, South Buffalo Railway Company to observe the wishes, counsel and advice of the Bethlehem Steel Company manager at Lackawanna in dealings between the South Buffalo Railway Company and the Steel Company?
>
> "A. No; no more than you would expect the South Buffalo Railway Company * * * to know and, so far as practicable, conform with the wishes of their customer. * * *"[6]

[6] His testimony has solid support in the testimony of the manager of the Steel Company's plants at Lackawanna that giving advice to South Buffalo was "* * * none of my business * * *" and that "* * * They [the South Buffalo] could follow my advice or not as they saw fit." (R. 820).

Third, he believed that advice given by the Steel Company did not relate to the activities of the South Buffalo as a common carrier, or its relations to its customers. He testified (R. 126):

> "* * * I may say that as far as I know the reliance upon the local plant managers in the case of the South Buffalo Railway and in the case of the other railroads had to do largely, if not solely, with questions relating to the best and most efficient way of doing business. I don't believe that they were consulted on questions relating to the, let's say, the discharge of the duties of the railroad with respect to the public; in other words, any questions of service to the other . . .
>
> "Q. When you say 'to the other', who do you mean?
>
> "A. The other shippers along the line I mean.
>
> "Q. Shippers other than Bethlehem Steel Company?
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> "A. Other than Bethlehem Steel Company; I would certainly not expect them to have or exercise any control there, and as far as I know, they never did. * * *"

Fourth, it is not the policy of the Holding Company to supervise the activities of its subsidiaries. He testified (R. 152):

> "* * * Our system of management has been, so far as the Corporation is concerned, largely to select people whom we believe to be competent to manage the activities of the various subsidiary companies, and then to let them manage them."

Fifth, his understanding that officials of the Steel Company may have overstepped their authority was based upon

his subsequent investigation of the facts. The Record shows (R. 125):

> "Q. Was it your opinion when you testified in Buffalo in 1943 that prior to the time the instructions were given to the officers of the Bethlehem Steel Company at Lackawanna that the manager of the Steel Company's properties there did exercise some degree of control or supervision over the activities of South Buffalo Railway Company?
>
> "A. Yes.
>
> "Q. On what did you base that feeling or belief or opinion?
>
> "A. I think it was largely questions and answers—investigation, etc.—which did disclose that they had done things up there which were a little bit beyond what was in my mind they were doing, * * *"[7]

None of Mr. McMath's testimony supports the view that the Holding Company issued any instructions prior to December, 1939, concerning the operation of the South

[7]Mr. McMath's answer continues (R. 125):

> "* * * we started in after the E. J. & E. case looking into what had happened and we found that there were certain things which had happened which might possibly be within the language, at least of the minority decision, of the Court in that case, and our counsel said that now that had better come to an end; that if there has been anything of that kind at South Buffalo or anywhere else it should be stopped, and whatever safeguards were necessary should be put in effect so it wouldn't happen again, and that is what I had in mind in answer to your qestion as to the change that occurred in 1939. At that time, however, sensible and wise it may have been from the viewpoint of economy to get the benefit of a trained organization in the steel plant, we were obliged, under the advice of our general counsel, to discontinue it; and that, as I understand it, was done."

Buffalo or its relations to the Steel Company. None of this testimony indicates that the Holding Company was aware of any reliance by the South Buffalo upon the Steel Company except as shown above.

No one else who was ever associated with the Holding Company gave testimony in the case except John M. Gross. His association with it commenced in 1940 (R. 176), after the South Buffalo's executive management had been reorganized. He was not interrogated and did not testify concerning the relations between the Holding Company and the South Buffalo or the Steel Company before December, 1939, nor concerning any instruction or communication by the Holding Company before that date relative to the South Buffalo, nor as to his understanding concerning the policy of the Holding Company with respect to the relations between the South Buffalo and the Steel Company prior to that date, nor concerning any related topic.[8]

No one associated either with the South Buffalo or with the Steel Company was interrogated, or gave any testimony whatever concerning advice, suggestions, instructions or communications of any sort by the Holding Company respecting the Steel Company's control or management of, or its relations to the South Buffalo, except the instruction, in or about December, 1939, that the Steel Company should

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[8]Thus the statement, at page 13 of the Government's brief, that "Testimony of high officials of the Holding Company and Steel Company disclosed the basis upon which South Buffalo's routine problems were resolved for it by the Steel Company" is doubly misleading, first because it indicates that "high officials of the Holding Company" gave testimony, and second because it indicates that the Steel Company not only gave advice but made decisions affecting the South Buffalo, and that it did so with the Holding Company's knowledge and approval.

not intervene in the South Buffalo's affairs. Nor did any person associated with either testify concerning his understanding as to what the Holding Company demanded or expected of either company relative to the South Buffalo's operations or its relations to the Steel Company prior to December, 1939.

Nor does any documentary evidence support such finding of the Trial Court. It is a notable fact that the Government, after extended examinations of the appellees' records, could find only two groups of documents running between the Holding Company and the South Buffalo, and did not find any documentary communication running between the Holding Company and the Steel Company, which it thought worth offering in evidence. Of the two groups of documents referred to, the first, consisting of 13 documents dated late in 1936 and early in 1937, relate to the two contributions that the Holding Company made to the South Buffalo in the autumn of 1936, to which we have referred above (Pl. Ex. 129-141; R. 776-787). The second group consists of two letters, written, respectively, by the Holding Company's Comptroller and the South Buffalo's President, in September, 1943, relating to accounting data required of the South Buffalo by the Holding Company's Comptroller in order to prepare necessary reports for the stockholders of the latter (Exhibits 81, 82; R. 746-750). Neither group of exhibits relates in any way to any requirement imposed or resting upon South Buffalo to apply to any official of the Steel Company for any purpose. Except for a Registration Statement which the Holding Company filed with the Securities and Exchange Commission, parts of which the Government offered in evidence (Pl. Ex. 3 through 11) but which

it has not thought worth printing and which, certainly, is silent upon the question under discussion, the foregoing are the only documents in the record to which the Holding Company was a party, either as writer or as addressee. Certainly if it had been the purpose of the Holding Company to dominate the South Buffalo, or to delegate that function to the Steel Company, some document evidencing that fact would have been uttered by the appellees at some time in the course of the 24 years during which they were affiliated. But such a document cannot be found in the record. Neither the documents described above nor any of the other documents which were received as exhibits in the case refer in any way to any requirement of the Holding Company affecting the relations between the South Buffalo and the Steel Company.

2. *The finding that the Holding Company did not consult the South Buffalo concerning the two contributions to its capital, which the Holding Company made in 1936.*

The Trial Court found that the two contributions which the Holding Company made to the South Buffalo in the autumn of 1936 "were decided on by the Holding Company without prior consultation with the South Buffalo", but that "the South Buffalo was advised of the purpose and the proposal" to make them. The Court also found, with respect to the second ($1,900,000) contribution, that "South Buffalo took no part in any action leading to" that contribution, but that "an officer of the defendant [the South Buffalo] was advised of the general purpose of the Holding Company with respect to" it (FF. 25, R. 914). *The Court did not find that those facts indicate domination.* (Italics ours)

The Trial Court's opinion,[9] however, states that the failure to consult the South Buffalo "indicates the exercise of the power of control over the railroad" (R. 903). When the proposed findings of fact were presented to the Trial Court, counsel for the appellees submitted a brief thereon,[10] which contested that statement, and also contested the statement in the opinion that "The railroad does not appear to have been consulted or to have had any part in" the decision respecting the contributions (R. 903), and pointed out evidence to the contrary which, they believed, the Trial Court had overlooked. When the findings were signed they omitted the statement that failure to consult the South Buffalo indicates the exercise of the power of control, and also the statement that the Sou. Buffalo had not been consulted respecting the contributions, and added the statement that South Buffalo had been "advised of the purpose and the proposal" to make the contributions, and also the statement that one of its officers "was advised of the general purpose of the Holding Company with respect to" the second contribution.

Thus it seems clear that the statement in the Trial Court's opinion that the course pursued by the Holding Company "indicates" domination was found by the Court to have been unwarranted upon further study of the record. It cannot reasonably be argued that a debtor-subsidiary which had been "advised of the purpose and the proposal" of its creditor-parent to make contributions to its capital in

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[9]The opinion precedes the findings by more than two months (R. 2).

[10]The brief, dated January 7, 1947, was mailed from New York direct to Judge Knight. It apparently was not entered in the Clerk's Docket (R. 2).

order to eliminate the debt and place it upon a dividend-paying basis was so ignored or slighted as to warrant a finding of domination, simply because such creditor-stockholder "decided on" the means by which to eliminate the debt "without prior cousultation" with it. Indeed, considering the kind of question presented and the clear legal rights vested in the Holding Company, both as creditor and as stockholder, the distinction, attempted to be drawn by the Trial Court, between prior notification of the purpose and the proposal and prior consultation concerning it appears to be a distinction without a difference. In any event the record does not show that a prior consultation was not had. That issue was not injected into the case until after the trial had been concluded. All the testimony cited as bearing upon it was actually directed to other issues.

The amended complaint did not allege that the Holding Company had not consulted the South Buffalo concerning the contributions. What it did allege concerning them was that "No shares of stock or other corporate securities or legal obligations were ever delivered or issued by the South Buffalo to the Holding Company" in connection with them, and that they were not "noted, recorded or audited as a loan, nor was any interest ever paid" upon them (Am. Compl't, par. 18, subds. (f) and (g); R. 10). Upon that issue extensive testimony was taken and the grounds and purposes of the contributions were explained (R. 121, 128-132; 134-135; 148; 198-200) so thoroughly that that the close of the trial, as noted by the Court's opinion, "The fact of the contributions is not criticised" (R. 903; 69 F. Supp. at p. 465).

The South Buffalo's indebtedness to the Holding Company had been a matter of concern to its officers and direc-

tors, and had been under discussion between them and representatives of the Holding Company for some time before the contributions were made (Pl. Ex. 129, R. 776-779). The Holding Company's first contribution to the South Buffalo was made pursuant to a resolution of the Holding Company's Board of Directors (Pl. Ex. 130, R. 779-780). The contribution was received by South Buffalo as representing an additional investment in its stock, and South Buffalo's journal voucher to that effect was approved by the Assistant Comptroller of the Holding Company (Pl. Ex. 140; R. 787).

The Government's brief (p. 17) comments (apparently with adverse implications) upon the fact that the deficit which this first contribution was intended to eliminate was shown upon the South Buffalo's books as being in amount, $46,163, while upon the Holding Company's books it was shown to be $211,616, and that the contribution made was in the latter amount. The reason for the difference in amount was that the Treasury Department, for tax purposes, permitted depreciation upon the South Buffalo's roadbed at a higher rate than was permitted by the Interstate Commerce Commission (R. 128-129). Under the circumstances the determination that the contribution should be in the larger amount is too obviously appropriate to require comment.[11] The Trial Court did not, and indeed could not, hold that such course indicated domination.

The Holding Company's second contribution was originally intended by it to be, and was accepted by South Buffalo as representing a purchase of South Buffalo's stock

[11]Under Section 664 of the New York Penal Law, payment of dividends when capital is impaired subjects directors to criminal liability.

(Pl. Ex. 131, 132; R. 780-782), but it later developed that the sale of such stock was not practicable because the stock, if issued, would have been required to be pledged under the provisions of an outstanding mortgage (Pl. Ex. 133, 134; R. 782-734). The parties therefore agreed that the second contribution should be made and received as a contribution to South Buffalo's capital (Pl. Ex. 135; R. 784-785). South Buffalo's journal vouchers show that the second contribution was first received as representing a subscription for stock, but that those vouchers were canceled (Pl. Ex. 136, 139; R. 785, 786) and new vouchers made out, which recited that the contribution represented an additional investment in South Buffalo's stock (Pl. Ex. 137, 138; R. 785, 786). The purpose of the approval of the journal entries by a representative of the Holding Company was to insure uniform treatment of the contributions in the accounts of the two corporations.[12] It is not claimed that in any other instance the Holding Company supervised the South Buffalo's records. And these were the only contributions which the Holding Company ever made to the South Buffalo.

The testimony cited by counsel for the Government to the Trial Court in support of the view that the South Buffalo was not consulted concerning the making of these contributions consisted of a single question and answer taken from a long examination of Mr. Trageser, vice president (and former president) of the South Buffalo, the obvious purpose of which was to support the Government's original contention that the making of the cont " .tions was not justified by the circumstances (R. 196-201). In

[12]Such correspondence between journal entries was particularly necessary for purposes of the Holding Company's consolidated balance sheets and reports to its stockholders.

the course of that examination, he was asked whether the South Buffalo's creditors were pressing it for payment, and replied that they were not. He was then questioned as follows, and gave the following answers (R. 198):

> "Q. What can you tell us concerning the circumstances surrounding *the making* of those contributions to South Buffalo Railway by the Bethlehem Steel Corporation?
>
> "A. Only that I was advised that there was a tax problem, and a problem concerning undistributed profits, and that with respect to those problems it was thought advisable for the South Buffalo Railway Company to liquidate its indebtedness to Bethlehem Steel Corporation, and that the Corporation was agreeable to making an additional investment in the capital stock of the Railway, *and there were discussions with regard to the issuance of that stock and the liquidation of the indebtedness in that way.*
>
> * * * * * * * *
>
> "Q. Was the South Buffalo Railway agreeable to the issuance of stock?
>
> "A. Yes." (Emphasis supplied)

He also testified that (R. 198):

> "A, * * * the matter ran along until into December, and I was advised that it was necessary to conclude it before the end of 1936, and the proposition of issuing stock was abandoned and the liquidation took the form of a contribution—as a gift—from the stockholder, Bethlehem Steel Corporation, to its subsidiary, South Buffalo Railway Company."

He consulted with counsel concerning the propriety of that arrangement (R. 200) and upon being advised that it was appropriate, signed an agreement modifying the

prior agreement. Thus the proof, though not directed to that issue, clearly discloses that the South Buffalo was not ignored when the contributions were planned and made, and that a different finding would have been contrary to the evidence.

Those two contributions are the only business or financial transactions between the Holding Company and the South Buffalo during the entire 24 years of their association as parent and subsidiary concerning which proof was offered. Aside from them the only action, shown by the Record,[13] taken by the Holding Company and affecting the South Buffalo is, we repeat:

The sponsoring of a single executive management for the seven subsidiary railroads in 1933;

The election of a new executive management for South Buffalo in 1939;

The agreement in 1943 concerning accounting data to be furnished by South Buffalo to the Holding Company's comptroller to enable him to prepare the required reports and balance sheets for the stockholders of the latter.

Thus the evidence clearly shows that the Holding Company did not "ascertain" that the Steel Company was unduly interfering in the South Buffalo's affairs until its investigation in 1939 (R. 916). That finding is neither consistent nor reconcilable with the finding of fact (if the Trial

[13] The record shows or indicates that the South Buffalo submitted accounting reports to the Holding Company and at times paid dividends to it, that the Holding Company had in some manner advanced to the South Buffalo the funds representing the indebtedness which was cancelled by means of the contributions, and that the Holding Company regularly elected the South Buffalo's directors, but except to the extent noted the Record is silent concerning those subjects.

Court so intended it) that the Holding Company "so dominated" the South Buffalo "as to effect a commingling of the identity and community of interest [sic] among" the three appellees, and that the Holding Company "required" South Buffalo officials to apply to Steel Company officials for guidance. The latter "finding" is actually a conclusion of law, is not supported either by other findings (compare *Interstate Circuit* v. *United States*, 304 U. S. 55) or by any evidence, and cannot be regarded as overruling or conflicting with the Court's explicit finding as to the time and manner of the Holding Company's ascertainment of the relations and practices existing between the other two appellees, to which we have referred.

The Government, in an attempt to show that in fact the Holding Company directly or indirectly dominated the South Buffalo, advances four grounds upon which, it contends, such a finding of actual domination may rest. One ground is that the Holding Company's two contributions to the South Buffalo in 1936 represent such domination (Br. p. 74). That question has been fully presented, and since the Government's argument throws no new light upon it we shall not brief it further. The other grounds are as follows:

First, the Government contends that "The domination of South Buffalo (in the interest of its producing sister-subsidiary) flowed directly from the management theories of the Holding Company." (Br., p. 64; see also pp. 65-67; 73). The Court will observe that the "management theories" thus referred to are completely at variance with the theory of management concerning which Mr. McMath testified. His testimony showed, in substance, that stated activities were assigned to stated persons and that, pursu-

ant to such theory Messrs. Kemmerer, Trageser and Petty were elected, consecutively, as presidents of the seven subsidiary railways. The "management theory" for which the Government now contends is entirely different. Under that theory all activities in a given plant area, regardless of the character of such activities, are under the control of the plant manager. No evidence in the record supports any such "management theory."

The Government's Brief next points out that prior to 1940 the South Buffalo and the Steel Company had offices in the same buildings at Bethlehem and at Lackawanna, and states that at Lackawanna "South Buffalo and the Steel Company were represented by resident managers" (p. 64). If that statement means that the South Buffalo always maintained a vice-president and general superintendent at Lackawanna (first Benning, then Royer, and now Dullenkopf), and that the Steel Company likewise always maintained a manager of its plants at Lackawanna (first Burns and thereafter Entwisle) it is true, though its bearing upon the Government's argument is not apparent. If the statement implies that the two companies had common offices or common executive officers it is not true, and is not even remotely borne out by the record reference which the Brief gives.

The only other evidence offered by the Government in favor of its supposed "theories of management", or theory of domination, is the following. First, Mr. McMath testified that in his personal opinion it would have been good judgment for the South Buffalo to have obtained advice from the Steel Company's experts on technical matters, and generally, to have acted upon such advice. He did not testify that he had ever expressed such view to, or had

heard such view expressed by, representatives of the South Buffalo, or of the Steel Company, or by any one else. Second, Mr. McMath testified that he had ascertained, in the course of investigations and hearings before the Interstate Commerce Commission, that the Steel Company's officials at Lackawanna at times may have overstepped their authority. That testimony has been referred to. Third, Mr. Entwisle, General Manager of the Steel Company's plants at Lackawanna, testified that (R. 819):

> "* * * If you mean did I assume that I had authority to make a final decision on what the South Buffalo Railway Company should do or not do, no; I never exercised any such supervision. I did exercise supervision to the extent that I felt entirely free to offer such advice and counsel to the superintendent of the South Buffalo Railway from the standpoint that both of us were companies owned by the Bethlehem Steel Corporation. I had an organization which was much larger than the South Buffalo Railway. I had a lot of highly qualified and highly paid talent in it, and I felt entirely free to offer suggestion for improving the mechanics of the operation of the railroad."

Assuming for purposes of argument that such course represented domination, the record does not contain any evidence that any officer or representative of the Holding Company, or even that any other executive of the Steel Company had directed or was aware of the fact that Entwisle was following any such course.

Thus the argument relating to "the management theories of the Holding Company" is without any value as evidence associating that Company with the alleged domination of the South Buffalo.

As a second ground to support its claim of domination by the Holding Company, the Government argues that (Br. p. 50):

> "* * * the inevitable domination of South Buffalo by its co-appellees is sharpened by the type of arguments advanced by them below. Instances of domination of South Buffalo by the Holding Company were repeatedly dismissed as 'necessarily involved in the holding company form of corporate management.' * * *".

Continuing and applying the same line of thought, the Government argues that in 1939, when the Holding Company took steps to render impossible any future domination of the South Buffalo it was guilty of domination, which domination consisted of (1) sponsoring the election of a new group of Executive officers and (2) directing *the Steel Company* not to intervene further in the South Buffalo's affairs (Br. pp. 78-79).

We believe it to be the right of stockholders to sponsor the election of competent executives, to initiate and control proceedings for the recapitalization of their corporation when it is in unsatisfactory financial condition, and to take action on its behalf when a situation of extreme emergency faces it. We believe that the appropriate exercise of such rights is not domination.[14] A determination to the contrary would necessarily conflict with all the decisions, under the

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[14] In our brief in the District Court we said (pp. 34-36):

> "* * * It is appropriate for the holding company, as stockholder, to elect the directors of its subsidiaries. * * *. It was appropriate also for the Parent Corporation as stockholder, when its executives discovered a situation which in their opinion threatened the security of the Railway's operations, to take means to eliminate that situation. * * *

Commodities Clause, upholding the right of a railroad company to transport the commodities of a producing company related to it through stock ownership as well as with all the decisions defining domination under the general law.

The third ground advanced by the Government as supporting its claim of domination by the Holding Company consists of its incentive compensation plan, which the Government calls "A persuasive inducement for Holding Company officials to exert supervision over its subsidiaries" (Br., p. 96), and its relief and pension plans, which the Government says, fortify the conclusion "that the Bethlehem organization is operated as an integrated whole" (Br., p. 97). The Government concedes that plans of both sorts were proven in the *E. J. & E.* case. Their bearing upon the charge of domination is not apparent. Indeed, the Trial Court points out that (R. 903):

> "With reference to the employees' benefit plans, requiring filing of detailed reports with the Holding Company and common counsel and occupancy of adjacent offices by South Buffalo and the Steel Company, the Government says: 'These matters, heavily relied on by the Government in the Elgin case, have not been stressed in this case.' * * *".

"It was also appropriate for the Parent Corporation as the owner of the stock of the Railway to fix the general range of compensation of its officers. * * *

"It has always been appropriate and is now necessary for a holding company to publish consolidated reports and balance sheets, in order that its stockholders and the public authorities may be properly apprised of the operations and financial position of the corporation and its subsidiaries as a whole.

"It was for the Parent Corporation as stockholder to determine whether and how the Railway was to be refinanced and the exercise of that power and the performance of that duty cannot properly be challenged."

It was proven that South Buffalo officers, directors and employees did not receive and were not entitled to receive compensation from the incentive compensation funds of the Holding Company (R. 132, 133). There is no evidence that any of such plans was ever used as a means of domination nor, under the circumstances, is it apparent how any of them could have been so used. The Trial Court found that they do not evidence domination (FF. 21, 22; R. 913). Such findings clearly are correct.

Thus the Government has signally and uniquely failed to show any evidence which in any manner implicates the Holding Company in the alleged domination of the South Buffalo at any time. If it was the intent of the Trial Court to find as a fact that such domination ever existed that finding must be set aside or ignored as unsupported by any evidence whatever.

C. The findings of the Trial Court that neither the Holding Company nor the Steel Company has dominated the South Buffalo since December 5, 1939, are supported by the overwhelming weight of the evidence.

As has been pointed out, the Trial Court found that (R. 921):

> "47. Since December 5, 1939, the officers and directors of South Buffalo have operated and carried on the business and management of the South Buffalo Railroad independent of and from the Holding Company and the Steel Company, either or both. The South Buffalo does not subsordinate and since December 5, 1939 has not subordinated railroad policy to the industrial policy of the Steel Company. * * *"

The Trial Court also found, repeatedly and in various forms, that since December 5, 1939, the relations among

the three appellees have been such that transportation by the South Buffalo of commodities of the Steel Company did not and does not violate the Commodities Clause (FF. 37, 38, 39, 40; R. 917-918; Findings 44, 47; R. 920, 921; Conclusions 6, 7, 8, 9; R. 922).

Those findings of fact may not be set aside unless clearly erroneous. In reviewing them, due regard must be given to the opportunity of the Trial Court to judge of the credibility of the witnesses, including South Buffalo's directors and principal executive officers, all of whom except one[15] appeared and testified. *Warren* v. *Keep*, 155 U. S. 265; Rule 52(a), Rules of Civil Procedure for the District Courts; compare *Kaeser & Blair, Inc.* v. *Merchants' Ass'n.*, 64 F. (2d) 575 (C. C. A. 6).

The findings are not erroneous. They are supported by substantial evidence. All five of South Buffalo's outside directors testified that, except that they had been requested by representatives of one or other of the appellees to become members of the South Buffalo's board of directors, no representative of the Holding Company or of the Steel Company had ever discussed the South Buffalo or its affairs with them[16] (R. 456; 471; 488; 492-493; 502-503). As has been pointed out, the South Buffalo's president, who was also a director, testified that no one representing the Holding Company or the Steel Company had ever attempted to influence his action as an officer or a director of the South Buffalo (R. 598-599). The Holding Company's vice presi-

[15]Sellers, Secretary-Treasurer and a director.

[16]In some cases they testified that they were acquainted with one of the Steel Company's plant executives but in all such cases added that, so far as they knew, such executives were not aware that they were directors of South Buffalo (see record references *supra*).

dent testified to the same effect (R. 147-151). Their testimony was not contradicted in any way, either by evidence contradicting the testimony outlined above or by evidence that either the Holding Company or the Steel Company had intervened or attempted to intervene in the South Buffalo's management or operation. As has been pointed out, also, the Government was obliged to concede in its brief to the Trial Court "that there is 'very little tangible evidence of domination'" since 1939 (69 F. Supp. at p. 465). That statement by Government counsel was both a concession of failure of proof on its part and a masterpiece of understatement.

We have said that the immediate and actual power to control the South Buffalo lay in its board of directors. The Trial Court's opinion states that (R. 907; 69 F. Supp., at p. 467):

> "* * * The ability of each member of the Board is clearly demonstrated. The Board met regularly and as is the case usually in the work of any Board of Directors, it considered and acted on all matters presented by its officers. * * * So far as this record discloses, each of the directors has performed his duties in the sole interest of the railroad. * * *"

The record discloses without contradiction that the board met four or five times yearly (R. 485; 498; 489; 479; 447); that the members were regular in their attendance (R. 158; 485; 491; 504); that full and accurate minutes of meetings were kept and were read to the directors (R. 455; 472; 495; 505); that reports, balance sheets, blueprints, etc. were sent to the directors at regular monthly intervals (R. 458; 473; 496; 497; 504); that they were taken upon inspection trips over the South Buffalo's property at least annually

and that at that time contemplated or new construction and the like were pointed out to them (R. 458; 472; 485; 494); that matters brought to their attention by the officers were fully explained and discussed before being acted upon (R. 448; 458; 485; 503-4); that the board always authorized and approved in advance all important contracts, expenditures, new construction, matters of policy and the like[17] (R. 460; 473; 487; 496; 507); that the directors were always placed in a position to act with full understanding upon the questions presented (R. 458; 495; 503-504); and that from all those standpoints the South Buffalo's corporate procedures were all that could be desired. In their testimony they described and discussed the principal matters which had come before them for action, including all the matters which the Government sought to question at the trial (R. 461-464; 474-478; 485-487; 496-497; 505-507).

Faced with this convincing evidence of competent management and supervision of South Buffalo's affairs by its directors the Government can raise only one objection, namely, that except upon the matter of dividends as to which, on occasion, the management's suggestions have not been followed[18] (R. 457; 471-2; 495; 504), the board has always approved the recommendations of its executive officers. If the Government could point out even one instance in which the board should not have so acted the objection might carry some weight. As the case stands, however, the Government criticizes the directors for fail-

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[17]That corporate procedure may be compared with the procedure in the *E. J. & E.* case, in which transactions were ratified by the directors, often long after their occurrence (298 U. S., at p. 509).

[18]Gov't Br. p. 87.

ing to vote against measures, fully described in the testimony, the wisdom of which the Government itself does not question. Thus the argument seems to be that disagreement solely for disagreement's sake is a badge or prerequisite of independence. That view is hardly consistent with the fiduciary character of a director's obligation.

The entire argument of the Government rests upon the premise that the Holding Company desires to dominate, and to control the operations of the South Buffalo. That premise was not accepted by the Trial Judge, who said that the Holding Company's reorganization of the South Buffalo's executive management in December, 1939, "was entered into in good faith" (69 F. Supp., at p. 465), and is not supported by any evidence. Not only is such a purpose unproven, but the Government fails even to point out what purpose or benefit the Holding Company might hope to achieve through such domination. In both respects the proof is in sharp contrast with *United States* v. *Reading Co.*, *United States* v. *Lehigh Valley R. Co.*, and *United States* v. *Delaware, Lackawanna & Western R. Co.*, in each of which the purpose of the defendant railroad to monopolize the production and transportation of coal in the anthracite-producing areas which it served was clearly proven, and in all of which the underlying motive was obvious. In this case the testimony of the South Buffalo's customers other than the Steel Company, some of which were competitors of the Steel Company, that they received good service and fair treatment, contradicts the view that the South Buffalo was employed as a means of discrimination. Moreover, the proof does not show that the South Buffalo is employed as a means of diverting railway company income to the Steel Company. While some

of the South Buffalo's practices were claimed by the Government to be for the Steel Company's benefit, others—as for example, its methods of charging and billing the Steel Company—by their nature could benefit only the South Buffalo. That situation prevailed to such an extent that the Government was finally compelled to argue that the appellees did not care into whose pocket the income went (R. 393),[19] and it so argues in this Court.[20] Assuming that to be true, it fails to uncover any comprehensible purpose on the Holding Company's part, to provide a motive for domination. From whatever angle the case is approached the fact remains clear that some real purpose, on the Holding Company's part, to dominate the South Buffalo is absolutely essential to all the Government's arguments and that the Government has completely failed to prove any such purpose.

The extent to which such a purpose to dominate the South Buffalo is essential to the Government's case is shown by a review of the principal argument which it advances to overthrow the Trial Court's findings and determination that no domination exists, and the practices and incidents by which it claims that domination is shown.

The principal argument advanced by the Government is the one based upon the staffing of the South Buffalo with former Steel Company officials, whose background, previously developed loyalty and hope of future reward, it is claimed, assure their primary devotion to the Holding Company. Concededly, those alleged facts will not result in domination—indeed, will preclude domination—unless

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[19]The subject matter there under discussion was the Steel Company's payment of demurrage charges to the South Buffalo.

[20]See Gov't Br., pp. 92-95.

the Holding Company desires it.[21] That principal argument is supported by two other arguments—that the South Buffalo's directors (except as to dividends) follow the suggestions of its executive officers; and that the South Buffalo's president has not had any prior experience in railroading. Clearly, those arguments do not have any content or significance unless a purpose to dominate is assumed.

As has been pointed out, if such arguments are to be accepted, the Court must hold either that neither a purpose to dominate nor acts of domination are necessary (since none have been found or proven in this case) or else that the relations of the parties (stock ownership and staffing the South Buffalo with former Steel Company employees) gives rise to a presumption of such a purpose and such acts, so conclusive as to override the contrary findings of the Trial Court, upon the evidence. And as we have said, in view of the provisions of the Transportation Act, the legislative history of the Commodities Clause and the cases construing the Clause, such a presumption can not be found to exist.

A review of the practices and incidents by which domination is claimed to be proven also demonstrates the extent to which the Government rests upon the unproven assumption of an intent to dominate to prove its case. The Government's principal contention is that the services which the South Buffalo performs for the Steel Company in the area west of the Hamburg Turnpike in some way indicate domination. Those services clearly are such as any switching

[21] An interesting sidelight is thrown upon the argument by the fact that the central figure in all the alleged acts of domination prior to 1939 was the South Buffalo's former vice-president and general superintendent, Benning. He had no prior or other connection with any other Bethlehem company.

carrier, whether or not affiliated with the industry, would gladly perform for compensation (R. 631-641). By their very nature they require integration of activities. Many other switching carriers perform like services (R. 687-688). Line-haul carriers also perform such services (R. 643-686; see *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11; *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156; *United States* v. *Wabash R. Co.*, 321 U. S. 403).

The South Buffalo has been performing substantially identical services in substantially the same way—all with the knowledge of the Interstate Commerce Commission—for more than 40 years, and for more than 20 years before Bethlehem interests acquired the Lackawanna plants and the South Buffalo's stock. *Industrial Railways Case*, 29 I. C. C. 212, 258 through 264 and 363 through 371, discussing the South Buffalo and its services at the Lackawanna Steel Company plants. Upon those facts the Trial Court rightly and necessarily found and determined that those practices and relations are lawful, are usual, and are not proof of domination (R. 920, 69 F. Supp. at pp. 462, 463, 466, 467). Particularly in view of the existence of the Second World War and the pressure which it placed upon the Steel Company's plants and the South Buffalo at the time, trivial incidents claimed to show South Buffalo's abnormal subservience to the Steel Company[22] obviously are without significance except as they show the length to which the Government has been compelled to go to make out even

[22] See Gov't Br., pp. 92-95.

the semblance of a case. The same is true with respect to the various business transactions involving the South Buffalo and the Steel Company. All were normal, reasonable, appropriate, and without evidentiary value as proof of domination. The Trial Court correctly so found (R. 918-921). Only the suspicion that those practices, acts and relations in some undisclosed way must have involved domination because the parties were affiliated gives those transactions any significance, or renders them worthy of notice. Intrinsically they are not evidence of domination.

As evidencing the utter baselessness of the Government's claim of actual domination of the South Buffalo after the "reorganization" of 1939, we list below the circumstances and the occurrences to which its brief refers as proof of domination.

First is the argument that such domination "has been primarily the result of the 'penetration of its management' previously effected." (Br. pp. 88-89). The point has been fully briefed.

Second is the argument based on the trackage arrangements and the character of the South Buffalo's services within the plants of the Steel Company at Lackawanna (Br. pp. 89-91). It will be observed, of course, that such services are purely intrastate, that they are not within the control of the Interstate Commerce Act, and that their only significance in the case is as supposed evidence of actual Steel Company control of the South Buffalo. The Government asserts, in substance, that it is unusual for a switching road to perform such services under such circumstances. But the Government did not submit any proof in support of that contention. The only supposed supporting evidence to which the Government's brief refers is evidence that the switching

services performed by the South Buffalo for its other industrial customers is less extensive than the services which it performs for the Steel Company although it did show that the South Buffalo performs for such others all the services which they require. On the other hand, repeated decisions by the Interstate Commerce Commission show that services and physical relations such as those existing between the South Buffalo and the Steel Company at Lackawanna are not unusual (*Industrial Railways Case*, 29 I. C. C. 212; *Manufacturers Ry. Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 28 I. C. C. 93); the president of the American Short Line Railroad Association testified that he personally was acquainted with at least 25 switching and terminal roads which performed similar services under similar conditions (R. 687-688); and qualified representatives of six line-haul railroads[23] and of one switching railroad serving Buffalo testified that they perform and are prepared to perform similar services under similar conditions. The argument that the willingness of any railroad company to perform services involving integration of activities with a plant in return for adequate compensation from the industry is evidence of domination is so obviously unsound that nothing more than a statement of it seems necessary. The concept that a railroad should perform all its services at its own operating convenience[24] stems wholly from decisions determining where interstate transportation begins or ends (as, see *Propriety of Operating Practices—Terminal Allow-*

[23]The Delaware, Lackawanna & Western R. R. Co. (R. 643), the Erie Railroad (R. 652), the Baltimore & Ohio Railroad (R. 658), the Lehigh Valley Railroad (R. 666), the New York Central Railroad (R. 674) and the Pennsylvania Railroad (R. 682).

[24]All of the services of the South Buffalo, regardless of their character, are performed at its operating convenience.

ances, 209 I. C. C. 11; *United States* v. *American Sheet & Tin Plate Company*, 301 U. S. 402)—a question not involved in the present case, nor relevant to it.

Third, the Government in support of its claim of domination, refers to various practices relating to the preparing and rendering of bills and the assessing of charges against the Steel Company, including the "forcing" of R-115's for switching movements not specifically ordered by the Steel Company but necesarily performed for it, the rendering of a comparatively simple form of bill to the Steel Company, and the alleged incorrect assessment of demurrage charges upon its cars (Br. pp. 92-95). Those alleged practices, in the aggregate, definitely favored the South Buffalo, thus rebutting the view that they were employed as a means of assessing excessive charges against interstate transportation, or against other shippers. That line of proof, in the main, was introduced in an unsuccessful attempt to show that "South Buffalo has performed * * * switching services for the Steel Company without lawful compensation" (Am. Compl't. par. 18(c); R. 10). The Government has yet to show either that any of the practices described were improper or that they indicate domination. The Trial Court correctly found that they did not.

Fourth, the Government in support of its claim, refers (Br. p. 95) to the failure of the South Buffalo to attempt to induce its other industrial customers to apply for coal consigned to the Steel Company at the time of the so-called "Coal Freeze Order" in June, 1943. The Steel Company was the most important war industry on the South Buffalo's lines, and one of the most important in the United States. Diversion of coal consigned to it would have been a National disservice as well as an infringement of the purpose of the Order, the terms of which the Government completely

misstates by saying that it "permitted the delivering of coal" to others than the consignees.[25] The Government refers to the incident as "of striking significance". It is—as evidence of the Government's point of view, and of the quality of its case.

Finally the Government refers (Br. p. 92) to a number of minor charges, all of which were denied by the appellees, and none of which resulted in findings in the Government's favor. It refers to the fact that at one time a South Buffalo locomotive and crew "stood by" at the Steel Company's shipping yard. The South Buffalo's superintendent testified that the crew was loafing (R. 322). The Trial Court thus describes the incident (R. 906):

> "When South Buffalo's General Superintendent learned of some unnecessary delays in the operations of its locomotives, he promptly took steps to stop them."

The Government refers, also, to the holding of loaded cars for the Steel Company. The record shows the following (R. 816):

> "Q. During June of 1943, was the new Bar Mill always able to take the billets being moved to it from the billet plant?
>
> A. They were not.
>
> Q. Why not?
>
> A. When the Bar Mill was designed, it was designed to take care of our normal peacetime distribution of business.
>
> With the increase in shell steel tonnage, which required preparation prior to shipment, the facilities at the Bar Mill billet yard were not ample to take

[25] The Government tried but failed to prove that prior to 1940, the South Buffalo attempted to hold on its rails a 3 days' supply of coal for the Steel Company. See Gov't. Br., p. 96; R. 378-385.

care of the large increase in tonnage, which required surface preparation.

Q. And what is the result of that situation? What happened to the billets on the way to the Bar Mill?

A. The result was the billets had to stand on cars until we were in a position to unload them."

Another of such charges was that in 1941 the South Buffalo "was still consulting" the Steel Company concerning types of locomotives to be purchased. The record shows that the South Buffalo intended to purchase a new type of diesel locomotive whose power to dump the Steel Company's ladle cars was thought to be inadequate. The point discussed was not whether such engines should be bought, but as to possible mechanical means of improving their dumping power after purchase (R. 753). Lastly, the Government refers to testimony of an Interstate Commerce Commission employee who observed South Buffalo's operations in 1943 and concluded that in certain instances they were integrated with operations of the Steel Company; as for example, that when a furnace was about to cast, it was neccessary to have ladles (which were mounted on cars) available to receive the hot metal and to move them to destination before the metal cooled. The Trial Court, after reviewing the evidence concerning such operations, found (FF. 44, R. 920) that they did not disclose "any abnormal condition or coordination showing domination or control * * *". It is incredible that any one should suggest to the contrary.

The trivial incidents and the commonplaces of industrial practice outlined above constitute the Government's entire case in support of actual domination since 1939. We believe that, even if entirely uncontradicted and unexplained, they

would be insufficient to support an inference of domination. That, however, is not the question for decision. The appellees have submitted convincing proof that domination does not exist and has not since 1939, and the Trial Court has so found and decided. Such findings and decision are clearly supported by the evidence.

D. Relations between the South Buffalo and the Steel Company prior to December 5, 1939.

We do not concede that the Steel Company dominated the South Buffalo prior to December 5, 1939. We believe that the relation between them was correctly described by Mr. Entwisle—the only witness having actual knowledge of such relations who gave testimony concerning them—as follows (R. 819):

> "If you mean did I assume that I had authority to make a final decision on what the South Buffalo Railway Company should do or not do, no; I never exercised any such supervision. I did exercise supervision to the extent that I felt entirely free to offer such advice and counsel to the superintendent of the South Buffalo Railway from the standpoint that both of us were companies owned by the Bethlehem Steel Corporation. I had an organization which was much larger than the South Buffalo Railway. I had a lot of highly qualified and highly paid talent in it, and I felt entirely free to offer suggestion for improving the mechanics of the operation of the railroad."

Upon that point the decision of the Trial Court is against us. That Court has found (FF. 26; R. 914-915) that during such period officials of the South Buffalo were required "in certain instances to apply to officials of the

Steel Company for guidance, advice and decisions in respect to South Buffalo's service to other shippers, and in respect of such of South Buffalo's internal affairs as personnel and wage policies, engineering problems, purchases of equipment and construction of additions and betterments", and that such domination is demonstrated by three designated groups of transactions which occurred, respectively, in 1934,[26] 1926[27] and 1931[28] and in connection with such internal management problems as the purchase of locomotives, the construction and enlargement of buildings, the location of a flood light and the propriety of forms of shippers' orders used by the South Buffalo. The matter of the flood light arose in 1938[29] and of the shippers' order forms in 1925.[30]

The Trial Court found, also, that between 1923 and 1939 letters were written by South Buffalo officials to officials of the Steel Company who were addressed as officials of the South Buffalo and that letters were written by John M. Gross, general traffic manager, vice president and a director of the Steel Company, on South Buffalo stationery and were signed by him as an official of South Buffalo (R. 27; R. 915). Finally, the Trial Court found that the Steel Company had "exercised some control with respect to the employment of certain personnel of South Buffalo", and that South Buffalo officials also conferred with Steel Com-

[26]Republic Steel Company transaction; Pl. ex. 48, 49; R. 720-721.

[27]Seneca Iron & Steel Company transaction; Pl. ex. 29-32; R. 703-707.

[28]Buffalo Sintering Corporation matter; Pl. ex. 34-39; R. 707-712.

[29]Pl. ex. 75; R. 742.

[30]Pl. ex. 27; R. 702.

pany officials with respect to rates of pay to be adopted by South Buffalo (FF. 28; R. 916).[31]

In view of the Trial Court's findings with respect to the period after December 5, 1939, including the findings that no domination had existed during that period, it is not important that we attack the findings with respect to the period prior to that date. Although several of the exhibits specified in finding 26 will be referred to later, it is impossible in a brief of any reasonable length to state the detail necessary to render understandable all the exhibits to which the Trial Court or the Government refers. Indeed the Government itself has attempted little or no analysis of them, but has simply quoted occasional phrases which seem to support its argument. However, the Trial Court's 27th and 28th findings relate to important matters of general corporate procedure and also, in the case of the 27th finding, to an important official of the Steel Company, and they require analysis.

The claim that officials of the Steel Company were addressed as officials of the South Buffalo rests wholly upon 27 letters, all written by Benning, vice president and general superintendent of the South Buffalo, during the 16 year period from 1922 to 1938.[32] In those letters the second or third line of the address was "South Buffalo Railway Company". Neither the name nor the corporate title of the person addressed ever appeared upon that line. As a physical fact, "South Buffalo Railway" was simply a

[31]This last finding is apparently a particularization of the statement in finding 26 that South Buffalo officials had sought "guidance, advice and decisions" from Steel Company officials, in certain instances, "concerning personnel and wage policies."

[32]Plaintiff's Exhibits 26, 30, 33, 34, 36, 37, 38, 39, 40, 42, 46, 50, 53, 54, 55, 56. 60, 61, 62, 63, 64, 65, 67, 68, 70, 72, 76.

part of the address. No person at any time associated with South Buffalo except Benning ever used such form of address. Steel Company officials, in responding to Benning, did not purport to speak or sign as South Buffalo officials.[33] Moreover, not all of Benning's letters to Steel Company officials used "South Buffalo Railway" as part of the address.[34] Benning, who was not a former Bethlehem man,[35] and who had been manager of the South Buffalo before Bethlehem interests acquired its stock, may have adopted such method of addressing letters while South Buffalo was under Lackawanna Steel Company ownership, since he was using it in the early 1920's.[36] However that may be, at least it is clear that no one except Benning ever used such form of address, and that the Government's contention now under consideration rests solely upon such use.

The Government's contention that Steel Company officials "addressed letters written on South Buffalo stationery both to South Buffalo officials and other officials of the Steel Company" rests wholly upon 8 exhibits, of which 2, both written in January, 1923 (and so, less than three months after Bethlehem interests acquired South Buffalo's stock) and a third, written in March, 1926, were written to South Buffalo officials, while the remaining 5, all written in the early 1930's, were addressed to other Steel Company officials.[37]

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[33] In certain instances letters otherwise appropriate were written by Kemmerer, then employed by the Steel Company, on South Buffalo stationery.

[34] Plaintiff's Exhibits 33, 41, 59, 69, 71, 77, 78.

[35] Pl. Ex. 20; R. 696.

[36] Pl. Ex. 26 (R. 700); Pl. Ex. 30 (R. 705).

[37] See Gov't Br., p. 68, and footnote 34. Exhibits 21, 23 and 31, claimed to be addressed to South Buffalo officials were written in January, 1923 (R. 697, 698 and March, 1926 (R. 705). The other exhibits are Nos. 121, 122, 124, 125 and 127.

The Government argues that John M. Gross, general traffic manager and a vice president and director of the Steel Company, wrote those letters (Br., p. 68). The Trial Court so found. Such finding and argument are contrary to the stipulation under which the letters were received in evidence namely "that these letters were signed *on behalf of* Mr. Gross" (R. 182).[38] Generally, the initials of Kemmerer, who was then employed by the Steel Company, appear upon them. Gross's initials do not appear. The Trial Court's opinion thus summarizes the parties' contentions (R. 902):

> "* * * They are written on South Buffalo stationery. Gross has denied all knowledge of these letters. One K. A. Kemmerer, until some time in 1932 when he became President of all subsidiary railroads, was an employee of the Steel Company. The letters purport to have been dictated by 'K. A. K.' The initials evidently refer to Kemmerer. There is also a letter purporting to have been written by Gross on South Buffalo stationery directed to James, Chief Engineer, and Burns, General Manager. James was Chief Engineer of the Steel Company. Kemmerer is now deceased. Whether Gross signed or authorized the signing of his name to the letters is of importance because he was an Executive officer of the Steel Company. The evidence justifies the conclusion that the Steel Company officials were knowing to the contemplated purchase of the land. * * *"

In the court below, the Government's argument that Gross must have signed the letters rested wholly upon the fact that counsel for the appellees permitted them to be

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[38] They were signed by Mr. Kemmerer. Mr. Gross testified that he had no recollection of them (R. 181, 182).

introduced in evidence under a stipulation without objection. That argument, apparently, was accepted by the Trial Court.[39] Considering that they apparently were written by Kemmerer and were taken from the appellee's files, counsel did not have any ground for an objection. Nor is the Trial Court's statement—obviously correct—that Steel Company officials were knowing of the subject-matter discussed in some of the letters,[40] of any moment, because those letters are entirely appropriate and are significant only because written on South Buffalo's stationery.

Why Kemmerer used South Buffalo stationery in writing the foregoing letters is a matter of conjecture,[41] as also, is the reason why Benning used the expression "South Buffalo Railway" in addressing his 27 letters. We submit, however, that such evidence is not a substantial or a sufficient ground for the finding or the argument that Steel Company officials regarded themselves, or were regarded, as South Buffalo officials.

The relation between the South Buffalo and the Steel Company with respect to the employment of South Buffalo personnel and rates of pay to such personnel were as follows.

Until 1941, when the South Buffalo constructed its present office building, the Steel Company acted somewhat as an employment agency for it in connection with the hiring of unskilled and semi-skilled labor,[42] Before 1939

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[39]Opinion; R. 901.

[40]Exhibits 121, 122, 124, 125, 127.

[41]The fact that the letters were upon South Buffalo's Lackawanna stationery may indicate that they were written at the South Buffalo's office following a tour of inspection by railroad over the property which the letters discuss.

[42]For such service it was paid by the South Buffalo (R. 192-194, Pl. Ex. 150).

the prospective employees of the South Buffalo were first interviewed and screened by the Steel Company's employment department, and were then interviewed by South Buffalo's foremen, who determined whether to hire them (Pl. Ex. 150). After 1939 and until sometime in 1941, applicants were first interviewed by South Buffalo's foremen. In both cases the Steel Company prepared records upon, and gave physical examinations, to such applicants.[43] It did not fix their rates of pay. It did not hire and had nothing to do with discharging any South Buffalo employes.[44] The Trial Court found (R. 916):

> "28. Prior to December 5, 1939, Steel Company exercised some control with respect to the employment of certain personnel of South Buffalo. Under the then customary procedure South Buffalo would transmit a requisition for the employment of men to the Steel Company's supervisor of employment who would interview applicants for jobs and pass on their fitness. * * *"

Concerning rates of pay the situation was as follows. Both the South Buffalo and the Steel Company had in their employ locomotive engineers, firemen, trainmen and unskilled and also semi-skilled laborers. Generally, employees of both companies were represented by the same unions. In such cases, Mr. Benning of the South Buffalo and Mr. Entwisle of the Steel Company generally consulted and acted together upon matters such as rates of pay.[45] Mr.

[43] R. 842-847.

[44] R. 192, 845.

[45] R. 822, 823. Plaintiff's exhibit 56 (R. 728), referred to at p. 72 of the Government's brief, is a case in which, in fixing rates of pay to locomotive firemen, "it is necessary to have a conference with the representatives of the enginemen's group."

Entwisle, however, did not control the wages paid by South Buffalo. He testified (R. 823):

> "Q. As a matter of fact, Mr. Entwisle, isn't it true that concerning the rate of pay to the employees of the South Buffalo Mr. Benning was not empowered to act without your approval?
>
> "A. Yes; he was. I think Mr. Benning—as a matter of fact I knew then and I know now that the Railway Company and Mr. Benning as its representative could follow my advice or not with respect to rates or anything else."

The Trial Court found (R. 916):

> "* * * South Buffalo officials also conferred with Steel Company officials with respect to rates of pay to be adopted by South Buffalo. Since December 5, 1940, this practice has been abandoned."

The fact that prior to 1941 the South Buffalo and the Steel Company had their offices at Bethlehem and at Lackawanna in the same buildings, which were owned by the Steel Company, played no significant part in the determination of the case. The Trial Court pointed out (Opinion, R. 903) that as to "occupancy of adjacent offices by South Buffalo and the Steel Company, the Government says: 'these matters * * * have not been stressed in this case'."

Of the nine letters specified in the Government's brief, most of which are referred to in finding 26, one (Ex. 27; R. 702), written in 1925, is a complaint concerning an error by the Steel Company's printing office in preparing South Buffalo's shippers orders, and is entirely appropriate and unimportant. Two others (Pl. ex. 55; R. 727, and Pl. ex. 63; R. 733), written, respectively, in 1936 and 1937, relate to structural changes to a grade crossing and a repair

shop ("flue shop"), respectively, both located on Steel Company land.[46] Another of such letters (Pl. ex. 64; R. 734) relates to the negotiations carried on by the South Buffalo and the Steel Company, over a period of years, to acquire the land over which ran the South Buffalo's track connecting its main property with its track at Seneca. The Trial Court dealt with the entire subject in finding 41 (R. 918-919). He found that no domination was involved. Still another of such letters (Pl. ex. 56; R. 728), written in 1936, has to do with rates of pay to oil-electric locomotive firemen, concerning which a conference was necessary "with the representatives of the enginemen's group." Since both the South Buffalo and the Steel Company owned and operated that kind of locomotives and had such employees working in proximity to one another, this was a common problem involving employee relations, upon which it was only prudent that they act together.

The question raised by plaintiff's exhibit 48 (R. 720), written in 1924, was whether it would be wise for South Buffalo to sell to Republic Steel Company swamp land which Republic wished to fill by dumping slag upon it. The effect of filling the land would be greatly to increase taxes upon it. Burns, to whom (together with the South Buffalo's president) the question was presented, passed it along to the Steel Company's Manager of Real Estate for an opinion (Pl. ex. 49; R. 721).

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[46]It appears probable that the repair shop (flue shop) itself belonged to the Steel Company, which generally performed major repair work to South Buffalo locomotives. An examination of the maps, plaintiff's exhibits 1 and 2 (not printed) will show both the flue shop and the Lakeview Avenue crossing west of the Hamburg Turnpike, all of which area is owned by the Steel Company.

Plaintiff's exhibit 36 (R. 709), written in 1931, is one of several (Pl. ex. 34-39; R. 707-712) relating to the encroachment of Buffalo Sintering Corporation's thaw house on South Buffalo land, and an attempt to determine upon a track layout which would permit the Sintering Corporation's locomotive to service the thaw house without fouling the South Buffalo's main track (R. 708). The thaw house had been constructed "in order to handle frozen flue dust and ore coming from the Bethlehem Steel Co." (R. 707) Parts of the letters indicate that it was proposed to use, in part, Steel Company land, for the new track layout, and that the Steel Company assumed a part or all of the expense. The correspondence in the record is not complete, however, and it is impossible to determine just what the situation was.

Plaintiff's exhibit 25 (R. 699) was a complaint written in 1924 by Burns, Manager of the Steel Company's plants at Lackawanna, that his transportation costs were too high. Part of those costs, obviously, consisted of rates paid the South Buffalo for switching and other plant services. Benning replied (pl. ex. 26) in substance, placing the blame on the Steel Company's own plant railroad (R. 700) and defending South Buffalo's charges as reasonable (R. 701-702). It is precisely such a letter as any independent carrier would write under the circumstances.

Plaintiff's exhibit 29 (R. 703), written in 1926, is one of several (exhibits 29 through 32; R. 703-707) relating to the application of Seneca Iron & Steel Company for a reduction of the rate charged by South Buffalo for intra-plant switching, because the switching movement involved was a simple operation. The question presented was whether a special rate should be given to Seneca, in which case, it was pointed out, applications by other customers for special rates could

be expected (R. 705). It was pointed out also that all trunk lines assessed a single uniform charge for all intra-plant switching movements (R. 704), as did also South Buffalo (R. 706). The determination reached was that it would be "impossible to set up a line of rates for all the varying conditions of our service in place of the group plan" (R. pp. 706-707). We concede that the submission of such a question to the Steel Company was inappropriate. However, the question presented was as to a method of assessing charges, and the decision reached affected all the South Buffalo's customers, including the Steel Company, in the same way. This is the only instance in the record in which any question affecting rates or services to shippers or consignees was submitted to the Steel Company.

However the exhibits and the other proof briefed above be regarded they clearly are not of such character as to warrant a finding that the reorganization of the South Buffalo's management which was carried out in December, 1939, was not undertaken in good faith, or that domination has existed since that time, or that there is any probability or danger of its recurrence.

POINT III

IF FOR ANY REASON A UNION OF PRODUCTION AND TRANSPORTATION HAS BEEN PROVEN TO EXIST, THE CASE IS NOT ONE IN WHICH A RAILROAD COMPANY TRANSPORTS COMMODITIES OWNED OR PRODUCED BY IT, OR UNDER ITS AUTHORITY, WITHIN THE MEANING OF THE COMMODITIES CLAUSE, BUT IS ONE IN WHICH THE OWNER OF PROPERTY DIRECTLY OR INDIRECTLY RENDERS SERVICES OR FURNISHES INSTRUMENTALITIES USED IN CONNECTION WITH ITS TRANSPORTATION, WITHIN THE MEANING AND UNDER THE SANCTION OF THE SHIPPERS' ALLOWANCE CLAUSE.

A. Purpose of the Shippers' Allowance Clause.

The purpose of the Shippers' Allowance Clause, §15(13) of the Interstate Commerce Act, was to empower the Interstate Commerce Commission to determine whether allowances paid by the line-haul railroads to shippers and consignees for rendering terminal services, and for providing instrumentalities used in connection with transportation, were reasonable. The legislative history of that Clause makes clear that terminal switching railroads owned by such shippers and consignees were intended to be within its control.

The enactment of the Hepburn Amendment, and of the Shippers' Allowance Clause as a part of it,[1] was the result

[1]The Commodities Clause was not a part of the Bill (H. R. 12987, 59th Congress, 1st Session) as originally introduced, or as sponsored by the Commission. It was introduced as an amendment to that Bill in the Senate, after the Bill had been passed by the House of Representatives. See, generally, 40 Cong. R. 6455-6461, 6494-6501, 6502-6514, 6551-6570.

of recommendations to Congress by President Theodore Roosevelt and by the Interstate Commerce Commission.

President Roosvelt, in his message to the 59th Congress, first session, submitted December 5, 1905, said:[2]

> "All private-car lines, industrial roads, refrigerator charges, and the like should be expressly put under the supervision of the Interstate Commerce Commission or some similar body so far as rates, and agreements practically affecting rates, are concerned. The private-car owners and the owners of industrial railroads are entitled to a fair and reasonable compensation on their investment, but neither private cars nor industrial railroads nor spur tracks should be utilized as devices for securing preferential rates. A rebate in icing charges, or in mileage, or in a division of the rate for refrigerating charges is just as pernicious as a rebate in any other way."

The Interstate Commerce Commission drafted and submitted to Congress the proposed statute which became the Hepburn Amendment.[3] The Shippers' Allowance Clause, in substantially the form and language in which it was enacted, was a part of that proposed statute. The statute, as so drafted and as enacted, contained three provisions which supplement and tend to clarify the meaning of the Shippers'

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[2]40 Cong. R. 92 (1905).

[3]See the Commission's 19th Annual Report (1905), at pp. 5-13; letter dated November 28, 1905, from Chairman Knapp of the Commission to Senator Elkins, Chairman of the Senate Committee on Interstate Commerce, a copy of which appears in the compilation of legislative materials on the Hepburn Bill prepared by the acting librarian of the Commission in 1908, with the notation that it was taken from the General Letter Book, No. 55, 1905-1906, p. 52; the proposed bill is printed as Appendix E to the Commission's 19th Annual Report, at pp. 177-183. The proposed Shipper's Allowance Clause is at page 179.

Allowance Clause. First, it defined "railroad" and "transportation" in such a way as to bring all terminal facilities within the control of the Act (34 Stat. 584; 49 U. S. C. § 1(3)). Second, it required any common carrier railroad subject to the Act to construct and maintain switch connections "upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation * * *" (34 Stat. 585; 49 U. S. C. § 1(9)). Third, it provided that "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, in connection therewith, shall be just and reasonable * * *" (34 Stat. 584; 49 U. S. C. § 1(5)).

The Shippers' Allowance Clause rounds out those provisions by bringing within the Commission's control all allowances paid to the "owner of property transported", when such owner "renders any service connected with such transportation, or furnishes any instrumentality used therein * * *" (34 Stat. 590). The Commission, in its Report to Congress sponsoring the legislation, said concerning that provision (19th Annual Report (1905) at p. 10):

> "Terminal Roads, Elevator Charges, and Private Cars."
>
> "There is an important class of cases, in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen in any case where the shipper is the owner of any of the facilities of transportation or performs any part of the transfer service. Such preference may take the form of an

excessive division to a terminal road owned by the shipper; the payment of an excessive elevator charge to the owner of the grain; the payment of ... excessive mileage upon the private car which conveys the the property of the owner of the car. * * *"

The Commission rejected the view that the railroads should be forbidden to employ any agency or facility of an owner of property in connection with the transportation thereof. Its Report states (pp. 10-11):

> "It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We should hesitate to recommend at this time so drastic a measure as that. * * *
>
> "We do think, however, that the Commission should be empowered in a case of this kind to determine whether the allowance to the property owner is a just and reasonable compensation for the service rendered and to fix a limit which should not be exceeded in the payment made therefor. * * *"

This Court has pointed out in at least three decisions that the rendering of services by a shipper or a consignee in connection with the transportation of his own commodities is expressly sanctioned by the Shippers' Allowance Clause. In *Union Pacific R.R. v. Updike Grain Co.*, 222 U. S. 215, 219, it ruled that "The statute must be taken as a legislative recognition of the long continued practice * * *"[4]

[4]The Court said also (222 U. S., at pp. 218-219): "The act recognized that the shipper himself might own the elevator or other facility included within the definition of transportation. For § 4 (34 Stat. 590) provides that 'if the owner . . . renders any service connected with such transportation, or furnishes any

of shippers to render such services. In *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46, it ruled that "if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them." And in *United States* v. *Baltimore & Ohio Railroad Company*, 231 U. S. 274, it repeated that statement, and applied it to a terminal railroad directly owned and operated by a shipper.

B. The Commodities Clause has never been applied to a terminal switching railroad.

When the Interstate Commerce Commission requested the Attorney General to institute this action, it abandoned a construction of the Commodities Clause and of the Shippers' Allowance Clause which it had theretofore maintained ever since the enactment of the Hepburn Amendment in 1906.

In only one case has the argument ever been made that the Commodities Clause may apply to a terminal switching railroad: *United States* v. *Baltimore & Ohio Railroad Company*, 231 U. S. 274, *supra*, decided in 1913. In that case the Court declined to consider the point because the order under review had not been based upon the Commodities Clause, and the argument based upon the Commodities Clause had not been presented below (p. 297). It ruled unanimously, however, that Arbuckle Brothers, sugar refiners, were entitled to an allowance, under the Shippers' Allowance Clause, for moving their sugar by means of their

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instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable,' the Commission being authorized to determine what was reasonable."

Jay Street terminal railroad[5] and lighterage service from their warehouses in Brooklyn to the freight terminal of the Baltimore & Ohio Railroad in New Jersey. Such terminal railroad and lighterage service (the Jay Street terminal) was operated by Arbuckle Brothers, under contract, as a union freight terminal on the Brooklyn water front for the Baltimore & Ohio and several other railroads. This Court, ruling that Arbuckle Brothers were entitled to an allowance under those circumstances, quoted from its prior decision in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46, as follows (231 U. S. at p. 293):

> "'. . . the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in § 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, c. 309, § 12, 36 Stat. 539, 551). As the carrier is required to furnish this part of the transportation upon request he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it.'"

The appeal in the *Baltimore & Ohio Railroad* case involved the legality of an order of the Interstate Commerce Commission enjoining the payment of such allowance to

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[5]The Interstate Commerce Commission's 59th Annual Report on the Statistics of Railways (for 1945) and prior Annual Reports classify "Jay Street Terminal and Arbuckle Brothers," as S-3 (p. 586) which the Commission defines as "Both switching and terminal" (p. 577).

Arbuckle Brothers,[6] on the ground that such payment involved an unlawful discrimination against competing sugar refiners. The Commission, which filed a brief in this Court, made no claim that the Commodities Clause was or might be involved. However, the Attorney General argued in this Court that if the service rendered by the Arbuckles through their Jay Street Terminal were held to be a part of the interstate transportation service, a violation of the Commodities Clause would necessarily result, since in that view Arbuckle Brothers would be common carriers by railroad engaged in interstate transportation. This Court said (p. 297):

> "* * * There is nothing in the record showing that such a contention was pressed upon the Commission, considered by that body, or that the order rendered was in any respect based upon the commodity clause. Indeed, the order permitted the continuance of the Jay Street Terminal and the business there conducted, providing only that like rights and allowances were made to the Federal Sugar Refining Company. The order, therefore, cannot be assumed to have contemplated that the Jay Street Terminal business was a violation of the commodity clause, since under that hypothesis the conclusion would be inevitable that the Commission by its order gave sanction to and permitted the continuance of the wrong which its powers were exerted to suppress. * * *"

Decisions construing the Commodities Clause do not throw any light upon the point presented. As has been noted,

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[6] Arbuckle Brothers were permitted to intervene in the action, to file pleadings, to join in the motion on which judgment was rendered, and to submit a brief in this Court.

all of them involved Class I railroads performing general transportation. No terminal switching road was a party to any of them. In two of those cases, arguments were presented which bear a superficial resemblance to the present argument. In neither case, however, was the argument made that the character of the defendant or of its services and instrumentalities was such as to render the Commodities Clause inapplicable, or to render the Shippers' Allowance Clause controlling. Such an argument could not have been made in those cases because those defendants were line-haul railroads performing general transportation.

The first case is *United States* v. *Delaware & Hudson Co.* (*supra*). The Delaware & Hudson Company argued that since it had been organized in 1823 to own and operate coal mines and a canal it was a producing company and not a railroad company: 213 U. S., at pp. 387-389. The Court held to the contrary: pp. 417-418. In view of the character and extent of that defendant's railroad transportation services and properties as an interstate Class I railroad,[1] the decision could hardly have been otherwise.

The second case is the *E. J. & E.* case. There the argument was made that although, in view of the Commodities Clause, a railroad company might not lawfully transport its own commodities, it might lawfully transport the commodities of the industry which owned its stock. Such argument was based expressly upon the provisions and the legis-

[1] The 34th Annual Report of the Interstate Commerce Commission, entitled Statistics of Railways in the United States, for the year 1920 (p. 413), classifies the Delaware & Hudson as Class I, and states that it operated 880 miles of railroad. The Commission's 58th Annual Report, for 1944, gives substantially identical data: p. 514. Its railroad was situated in two states: 213 U. S. 163, footnote.

lative history of the Shippers' Allowance Clause. The District Court accepted that argument as correct.[8] This Court, affirming the judgment on other grounds, did not refer to it. As has been pointed out, the E. J. & E. was a Class I railroad with its lines extending into two states: 298 U. S. at p. 497[9].

The Government argues that the mere ownership by an industry of the stock of an industrial switching railroad which serves it, or the mere affiliation of such a railroad and an industry, through a holding company owning the stock of both, is sufficient to bring such a railroad within the control of the Commodities Clause. But even before the enactment of the Clause, the Commission knew, and the Government was chargeable with the knowledge that many industries owned the stock of terminal switching railroads which served them in precisely the same manner in which the South Buffalo serves the Steel Company at Buffalo, Lackawanna and Hamburg.[10] In the *Industrial Railways Case*, 29 I. C. C. 212, decided in 1913, the Commission

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[8]The trial Court's opinion does not refer to the question, but its decision contains the following conclusion of law (Record in that case, p. 449):

> "3. The transportation in interstate commerce by a railroad corporation whose stock is owned by an industrial corporation, of commodities produced or owned by such industrial corporation, is not a violation of said Commodities Clause of said Interstate Commerce Act, but is sanctioned by, and subject to regulation under Section 15(13) of said Interstate Commerce Act."

[9]The Interstate Commerce Commission's 50th Annual Report on Statistics of Railways in the United States, for 1936, at p. 227, classifies the E. J. & E. as Class I, and as owning 185 miles and operating 435 miles of railroad.

[10]*Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *Union Pacific Railroad Co.* v. *Updike Grain Co.*, 222 U. S. 215; and see this brief, pp. 101-103, *infra*.

reviewed at length the relations between some 20 such railroads serving the principal steel industries in the East and the industrial owners of their stock. The appellee South Buffalo,[11] and the Lackawanna Steel Company, which then owned its stock, and also the appellee Steel Company and the other terminal railroads whose stock is owned by the appellee Holding Company, were among the corporations named and referred to in that proceeding. Since then, repeatedly, the Commission has reviewed the relations between such companies. All its Annual Reports on the Statistics of Railways in the United States since as early as 1920 have named industrial railways serving industries directly or indirectly related to them through stock ownership, including, specifically, the South Buffalo. As will be shown, both the Attorney General[12] and Congress have been regularly and repeatedly advised of that relation, and have taken cognizance of it.

The character of such ownership and the extent to which such inter-corporate stock relations are prevalent in the United States is shown by the Commission's most recent published Report on the Statistics of Railways in the United States (the 59th Annual Report for 1945). At pages 577 through 580 it names and classifies terminal switching roads (under the caption: "Switching and Terminal Companies")[13] in the Eastern Territory of the United States,

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[11] See also *Industrial Railways Case*, second decision, 32 I. C. C. 129, *Lackawanna Steel Company* v. *South Buffalo Railway et al.*, 56 I. C. C. 684, and *Jones & Laughlin Steel Co.* v. *Pittsburgh & Lake Erie, etc.*, 91 I. C. C. 301, 307, in all of which the appellee, South Buffalo, was a party.

[12] See *supra*, p. 32.

[13] The title of the Section, in full, is "Table Showing Mileage and Intercorporate Relation of Switching and Terminal Companies on December 31, 1945." (p. 575).

and reports the "Intercorporate Relation", that is, the ownership of such roads. There are 106 such railroads in that territory, of which 44[14] are owned by industries which

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[14]In four cases the terminal road is owned outright. In 26 cases there is complete, and in 14 others there is majority, stock ownership. The 44 industrially-owned terminal railroads as named are:

Aliquippa and Southern Railroad Company.
Oliver Iron & Steel Corporation's R. R.
Alton and Southern Railroad.
The Chicago, Peoria and Western Railway Company.
Benwood and Wheeling Connecting Railway Company.
Berlin Mills Railway.
Brooklyn Eastern District Terminal.
Canton Railroad Company.
Chicago and Calumet River Railroad Company.
Chicago, West Pullman & Southern Railroad Company.
Conemaugh & Black Lick Railroad Company.
The Cuyahoga Valley Railway Company.
Delray Connecting Railroad Company.
Dexter & Northern Railroad Co.
Donora Southern Railroad Company.
East Erie Commercial Railroad.
East Jersey Railroad and Terminal Company.
Etna and Montrose Railroad Company.
The Euclid Railroad Company.
Fore River Railroad Corporation.
Indiana Northern Railway Company.
Johnstown and Stony Creek Rail Road Company.
The Lake Terminal Railroad Company.
The Lorain and Southern Railroad Company.
The Massena Terminal Railroad Company.
McKeesport Connecting Railroad Company.
Monessen Southwestern Railway Company.
The Monongahela Connecting Railroad Company.
New Haven & Dunbar Railroad Company.
The Newburgh and South Shore Railway Company.
Patapsco & Back Rivers Railroad Company.
Philadelphia, Bethlehem and New England Railroad Company.
Pittsburgh and Ohio Valley Railway Company.

they serve, either directly, or through the ownership of all or a majority of the outstanding stock of the terminal railroad. Industrial owners, in addition to the appellee Holding Company, include such concerns as United States Steel Corporation, Jones & Laughlin Steel Corporation, International Harvester Company, Tidewater Oil Corporation, Aluminum Company of America, General Electric Company, Allied Chemical & Dye Corporation, a stone quarry, a coal company and a paper company. The Report shows that other terminal roads are owned, directly or through stock ownership, by terminal companies, by stockyard companies and by other corporations under such circumstances as to make clear that the railroads carry the owners' commodities, and that they were organized or acquired for that purpose. Still other terminal roads are owned and operated by the line-haul railroads. Only a small minority are without stock affiliation of some sort.

Thus it is too plain for argument that, if the view now advanced by the Government were accepted, nationwide industrial relations which have existed, unquestioned, for a half century, would be disrupted, that under that view both the Commission and the Government during that entire period, "gave sanction to and permitted the continuance

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Pittsburgh, Allegheny & McKees Rocks Railroad Company.
Pullman Railroad Company.
The River Terminal Railway Company.
South Buffalo Railway Company.
The Springfield Terminal Railway Company.
Steelton & Highspire Railroad Company.
Union Railroad Company.
Upper Merion and Plymouth Railroad Company.
Wyandotte Southern Railroad Company.
Wyandotte Terminal Railroad Company.
The Youngstown and Northern Railroad Company.

of the wrong which its powers were exerted to suppress",[15] and that by their attitude and action they have established an administrative construction of the Commodities Clause and the Shippers' Allowance Clause which is now binding upon them. *New York, Chicago & St. Louis R. Co.* v. *Frank,* 314 U. S. 360; *United States* v. *Chicago North Shore R. Co.,* 288 U. S. 1.

C. The Commodities Clause and the Shippers' Allowance Clause apply to different parts of the interstate railroad transportation service.

By enacting the Commodities Clause and the Shippers' Allowance Clause as parts of the Hepburn Amendment of June 29, 1906, Congress divided all interstate railroad transportation services, facilities and instrumentalities within the control of the Interstate Commerce Act into two parts, one governed by the Commodities Clause, and the other by the Shippers' Allowance Clause. To hold otherwise would be to bring the two statutes into direct and irreconcilable conflict.

The Commodities Clause and the Shippers' Allowance Clause apply to interstate transportation by railroad only as parts of, and within the limits fixed by the Interstate Commerce Act. Neither of them can apply to any transportation service, facility or instrumentality to which the Act does not apply. The Shippers' Allowance Clause is expressly concerned with and expressly applies to "property transported under this chapter." The "service connected with such transportation, or * * * instrumentality used therein" which falls within its provisions must necessarily

[15] *Baltimore & Ohio Railroad case,* 231 U. S., at p. 297.

be a part of that interstate railroad transportation service which is within the control of the chapter.[16] This Court has held repeatedly, in construing and applying the Shippers' Allowance Clause, that terminal switching services and services related thereto which are not a part of the interstate railroad transportation service, customarily performed by line-haul railroads and covered by the line-haul rate, are not within the scope and coverage of the Shippers' Allowance Clause by reason of that fact: *United States* v. *American Sheet & Tin Plate Company*, 301 U. S. 402; *Goodman Lumber Co.* v. *United States*, 301 U. S. 669; *A. O. Smith Corp.* v. *United States*, 301 U. S. 669; *United States* v. *Pan American Petroleum Corporation*, 304 U. S. 156; *United States* v. *Wabash R. Co.*, 321 U. S. 403; *Hanna Furnace Corporation* v. *United States*, 323 U. S. 667. Such, also, is the construction always-placed upon this Clause by the Interstate Commerce Commission; *Propriety of Operating Practices-Terminal Services*, 209 I. C. C. 11; *Industrial Railways Case*, 29 I. C. C. 212; 32 I. C. C. 129.

It cannot be contended that both the Commodities Clause and the Shippers' Allowance Clause apply to the same interstate transportation services and instrumentalities. Otherwise, the Commodities Clause would forbid the owner of property transported to render the very services and provide the very instrumentalities which the Shippers' Allowance Clause contemplates, and for which it expressly provides that such owner shall be paid. Clearly this Court, and the Interstate Commerce Commission, in rendering the

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[16] In 49 U. S. C., § 15(13) the word "Act" is substituted for the word "Chapter". The provision reads: "If the owner of property transported under this *Act* directly or indirectly renders" etc.

decisions cited in the preceding paragraph, did not assume that the services there under consideration would have been unlawful under the Commodities Clause, if they had been a part of the interstate railroad transportation service, nor did this Court or the Commission suggest that terminal switching services, which are the very end-terms of such transportation service, were within the control of that Clause. Such a construction of the Commodities Clause, in effect, would have written the Shippers' Allowance Clause out of the Act.[17] The Shippers' Allowance Clause, however, embodies a national transportation policy. While the Commodities Clause has been strictly limited by Congress to its original field of operation and never extended,[18] the provisions of the Shippers' Allowance Clause have been extended to motor carriers (49 U. S. C. § 324a; 54 Stat. 928) and water carriers (49 U. S. C. § 914; 54 Stat. 945; both enacted in 1940). It is entitled to a construction consonant with those facts.

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[17] A construction of those statutes which would deprive the Shippers' Allowance Clause of any possible application or significance might be justifiable only if the language and history of the two statutes left no alternative course available (*McDonald* v. *Thompson*, 305 U. S. 263; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204; *Ex parte Public Bank*, 278 U. S. 101; see also *Illinois Steel Co.* v. *Baltimore & Ohio Railroad Co.*, 320 U. S. 508, 513, 514), which is not the case, as both the language and the history of the two statutes show (see *infra*, p. 112 *et seq*; 126 *et seq*; *supra*, pp. 92 *et seq*). Repeal by implication is never favored (*United States* v. *Borden Co.*, 308 U. S. 188).

[18] As shown in this brief (*infra*, pp. 128 *et seq.*) repeated attempts to amend the Commodities Clause in such a manner as to make it applicable to all common carriers have been defeated in Congress.

D. Under views of the law and of the facts which are essential to the Government's cause of action this case is one in which an industrial enterprise directly or indirectly renders services in connection with the transportation of its own commodities.

The essential requirements of the Government's case necessitate a union of transportation and production or ownership in, or under the control of a single corporation. The necessity for such a union is established by the provisions of the Commodities Clause, by all the decisions construing it, and by all the judicial opinions, both majority and dissenting, which discuss it.

The position assumed by the Government in its amended complaint and in the Court below is the traditional one that, by reason of domination—either actual or implied from stock ownership—the South Buffalo and the Steel Company are mere departments of the Holding Company. The amended complaint alleges that by reason of such stock ownership and of the character and extent of the services which the South Buffalo renders to the Steel Company and of the degree of integration necessarily involved in such services, and of various other facts, actual or alleged, "the affairs of said three companies have been and are in fact so commingled and the identity and community of interest between them is such that in substance and reality they are one and the same organization at Buffalo, Lackawanna and Hamburg, New York, consisting on the one hand of a steel producing branch and on the other of a transporting railroad common carrier branch, both wholly owned and completely dominated by the same financial interest, the Holding Company", and that "both the South Buffalo and the Steel Company" are "mere adjuncts, branches, or depart-

ments of the same enterprise or business, * * *" (Am. Complt., pars. 21, 22(1); R. 12).

In this Court the Government suggests that the Commodities Clause may have been violated even though no active domination is proven, and even though the separate corporate entity of the South Buffalo be fully recognized. The argument is that even under those circumstances the commodities of the Steel Company, when in transit over the South Buffalo's railroad, "were and are in reality in truth and fact manufactured, produced, and transported by and under the direction of the same authority; * * *" (R. 13; Am. Complt., par. 22(2)). The quoted language was suggested by the Court's opinion in the *Reading* case (253 U. S., at p. 61). In that case it is not clear whether the "authority" which the Court had in mind was the Reading Company (the holding company) as stockholder, or consisted of the officers and directors in common of the three defendant Reading corporations. Since no director or officer of the South Buffalo has ever been a director or officer of the Holding Company or of the Steel Company, the "authority" referred to in the present case must necessarily be that of the Holding Company as owner of the stock of the other two appellees. In that view, the Holding Company's ownership of the stock of the Steel Company would constitute an interest, direct or indirect, in the commodities of that Company,[19] and would also constitute control, direct or indirect, over the production and the transportation thereof.

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[19]That view was rejected in the *Delaware & Hudson* case, 213 U. S., at pp. 413-415, and in every case since then. It was not accepted by the minority opinion in the *E. J. & E. case;* 298 U. S. at p. 512.

But whichever view be accepted, and however the argument be stated, the question still remains—is the corporation which owns and transports the property, or in which transportation and production or ownership are in some degree united, a "railroad company", which transports commodities manufactured, mined or produced by it or under its authority, or which it owns, in whole or in part, or in which it has an interest, direct or indirect, within the meaning of the Commodities Clause? Or on the contrary, is the case one in which the owner of property transported directly or indirectly renders services connected with its transportation or furnishes instrumentalities used therein, within the meaning of the Shippers' Allowance Clause? To those questions, we submit, there is only one possible answer. Every fact in the case, and every theory which can be applied to it brings it within the terms of the Shippers' Allowance Clause and prevents the Commodities Clause from applying to it.

The case is clearly one in which "the owner of [the] property transported under this chapter" is a steel company and not a "railroad company". That is clearly the fact. It is also the Government's theory. The amended complaint alleges (R. 8):

> "18. (a) South Buffalo is a unit in the organization operated by the Holding Company, largely through the Steel Company, for the manufacture of steel and of products made of steel in whole or in part. The Holding Company and the Steel Company are not interested in the operations of the South Buffalo as an independent railroad corporation but are interested in it only as a unit in the larger organization."

In point of fact the Steel Company owns the property transported. If the Steel Company and the Holding Company are to be regarded as being or representing the same entity, then the Holding Company is such owner. If the stock interest of the Holding Company be regarded either as ownership or as an interest, direct or indirect, in the commodities produced by the Steel Company, any such property interest necessarily vests in the Holding Company, which to that extent must be deemed to be "the owner of [the] property transported under this chapter." Upon either of those views, moreover, the case is one in which such an owner "directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein," as provided in the Shippers' Allowance Clause. If by reason of domination the Holding Company and the South Buffalo be deemed to be the same entity, the Holding Company, being that entity, "directly" renders the service and provides the instrumentality. If on the other hand the separate identity of the South Buffalo is recognized, but the Holding Company's stock ownership, or its election of officers or directors supposedly subservient to it, or some other proven or assumed fact be deemed to involve some degree of control over the South Buffalo, the case is one in which the Holding Company "indirectly" renders the service and provides the instrumentality.

Further, the case is one in which, as provided in that Clause, the Interstate Commerce Commission has on occasion[20] determined "what is a reasonable charge as the

[20] As, see *Jones & Laughlin Steel Co.* v. *Pittsburgh & Lake Erie R. R. Co.*, 91 I. C. C. 300, in which the Commission held South Buffalo and certain other terminal roads entitled to compensation not exceeding 10 cents per ton or the amount fixed in their filed tariffs, upon carload shipments (pp. 307, 308); see also Pl. Ex. 154, R. 852-854.

maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished", and in which "the charge and allowance therefor" are "published in tariffs or schedules filed in the manner provided in this chapter * * *". The South Buffalo files such tariffs with the Commission (Def. Ex. D-1, D-5, D-7, D-8; R. 863-864; 878-881; Adm. R. 511) as do also the line-haul railroads with which it has rail connections. Those tariffs provide for terminal switching services to be be performed by the South Buffalo for such railroads.[21] The South Buffalo receives a switching allowance from those railroads for such services, which it renders for them within the Buffalo Switching District (R. 352). The South Buffalo performs no other services and receives no other compensation in connection either with the transportation of commodities moving interstate, or with line-haul transportation of any sort (R. 606-609; 344-348).

Thus every factual element of the case and every theory which is or can be advanced by the Government with respect to such facts, and the effect of domination or stock ownership, conforms exactly to the language of the Shippers' Allowance Clause, as that language was understood in 1906, when the Hepburn Amendment was enacted, and as it has been understood ever since.

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[21] We do not contend that South Buffalo's charges were fixed or paid by authority of the Shippers' Allowance Clause. They could not have been, since the South Buffalo and the Holding Company and the Steel Company have always been regarded as separate entities, as they are in fact. However, if such separate entity were to be disregarded, the procedure followed with respect to allowances would harmonize exactly with the provisions of the Shippers' Allowance Clause.

E. The case is not within the language of the Commodities Clause.

The Commodities Clause and the Shippers' Allowance Clause supplement each other. The latter Clause represents the basic policy of the Interstate Commerce Act—the regulation of rates by the Commission. We are therefore clearly entitled to a construction of the Commodities Clause which is based upon the reasonable meaning of the words in which it is expressed, and which does not nullify the Shippers' Allowance Clause.[22] No normal, technical or reasonable construction of the language of the Commodities Clause can bring that language and the proven facts into harmony.

It is not a fact that the commodities of the Steel Company were produced by, or under the authority of, the South Buffalo (R. 610). The Trial Judge's conclusion with respect to the period prior to December 5, 1939, was exactly the opposite: "the South Buffalo became * * * an agent or instrumentality or department of the Holding Company or its subsidiary, the Steel Company" (R. 922). It cannot be argued that the expression "which it may own in whole or in part, or in which it may have any interest direct or indirect" fairly or reasonably represents any property relation which the South Buffalo bears or ever bore to the commodities of the Steel Company. If such an in-

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[22] "* * * Both sections are parts of important general statutes and their principal language should be construed in the light of the purposes which led to the enactment of the entire legislation. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 542. The words of the sections under consideration are, however, basic data from which to draw the sections' meaning. * * *". *Southland Co.* v. *Bayley*, 319 U. S. 44, 47.

terest were to be found, it would exist solely by reason of the stock relation of those two corporations, through the Holding Company. But, while there are reasons for the view that stock ownership represents an indirect interest in the property of the corporation whose stock is owned, no one has ever suggested, and certainly it is not the law, that such corporation has any such interest in the property of its stockholders, or in the property of other corporations in which such stockholders may own stock. Such a notion would run counter to the current of all judicial and economic thinking. Any such construction of the expressions "which it [the South Buffalo] may own * * * or in which it may have any interest" would reverse their normal meaning. It would not represent that "'plain, obvious and rational meaning of a statute'" which "'is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case * * * would discover.'" *Old Colony R. Co.* v. *Commissioner of Internal Revenue*, 284 U. S. 552, 559-560, quoting *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, 370. As the Court said in *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 617:

> "We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. * * *"

The Government disagrees with the view expressed above. It argues (Br. p. 40) that "in the light of the statutory purpose, it would seem to be obvious that the 'interest' referred to is a sufficient financial interest of the railroad *in the fortunes of the shipper* to constitute an inducement to discriminate in favor of the shipper." (Italics ours). The argument ignores the plain language of the statute, which provides that a railroad company shall not transport "*any article* or commodity * * * which it may own in whole or in part, or *in which it may have any interest*, direct or indirect * * *." The attempt to transform the interest which that clause forbids from an interest in a commodity to an interest in an affiliated corporation completely abandons and, indeed, contradicts the language used, first, because under such view the "interest" forbidden would be in a corporation and not in a commodity, and, second, because such "interest" would not be an interest in the nature of ownership, even in such affiliated corporation. Yet the grouping of the words used by the Commodities Clause clearly shows that a property interest was intended: "which it may own in whole or in part, or in which it may have any interest, direct or indirect * * *." All prior decisions of this Court have recognized, and several have expressly stated, that the forbidden interest is a property interest; as, see *Delaware & Hudson* case, 213 U. S., at pages 413-415[23]; *United States* v. *Lehigh*

[23]The decision states (213 U. S., at p. 415):

> "We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined or produced by a carrier or under its authority, and at the

Valley R. Co., 220 U. S. at page 266; *United States* v. *Delaware, Lackawanna & Western R. Co.*, 238 U. S., at pages 529, 536; *E. J. & E.* case, 298 U. S., at page 499.

So far as we have been able to ascertain, the only support in the authorities for the Government's interpretation of the expression "interest, direct or indirect" is the following passage from the dissenting opinion in the *E. J. & E.* case (298 U. S., at pp. 504-505):

> "It is not denied that the 'indirect' interest of the carrier in the commodity transported, at which the statute strikes, may be effected through the instrumentality of a holding company which owns the stock both of the carrier and the company which manufactures and ships the commodity. This was definitely established by the decision in *United States* v. *Reading Co., supra*, where it was held that the power of control through holding company ownership of all the capital stock both of an interstate rail carrier and a shipper producing the commodity carried, plus an active exercise of that control, are enough to make the transportation unlawful."

But this Court in the *Reading Company* case based its decision not upon the "interest, direct or indirect" provision of the Commodities Clause, but upon the provision respecting control. The Court said (253 U. S., at p. 61):

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time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (b) When the carrier owns the article or commodity to be transported in whole or in part; (c) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder."

> "Accepting the risk of obscuring the obvious by discussing it, and without splitting hairs as to where the naked legal title to the coal would be when in transit, we may be sure that it was mined and produced under the same 'authority' that transported it over the railroad. * * *"

It is true that in the *Reading Company* case the Court stated "The real question" to be (p. 60):

> "* * * whether combining in a single corporation the ownership of all of the stock of a carrier and of all of the stock of a coal company results in such community of interest or title in the product of the latter as to bring the case within the scope of the provisions of the act."

But it then proceeded to point out the significance of that statement (p. 61):

> "* * * Plainly in such a case as we have here this evil would be present as fully as if the title to both the coal lands and the railroads were in the Holding Company * * *. Being thus clearly within the evil to be remedied, there remains the question whether such a controlling stock ownership in a corporation is fairly within the scope of the language of the statute."

That question it answered by reference to the provision respecting *control*, and not the provision respecting *interest*. Thus the *Reading Company* case, like the other cases construing the Clause, is adverse to the Government's contentions. It recognizes that, if there existed in that case any union of transportation and interest in the commodity transported, such union would exist in the holding company. It does not support the construction placed upon "interest" by the minority in the *E. J. & E.* case.

Neither the Holding Company nor the Steel Company is a "railroad Company", either in fact or in contemplation of the Commodities Clause, and neither of them transports commodities from one state to another. A determination that they, or one of them, own, operate and control the South Buffalo would not alter that fact. A different conclusion would place every terminal railroad and every railroad plant facility within the control of the Commodities Clause. The legislative history of the Hepburn Amendment makes clear that nothing of the sort was intended.[24]

Not every company operating an interstate railroad is a "railroad company" engaged in interstate transportation within the contemplation of the Interstate Commerce Act: *Pennsylvania Railroad Co.* v. *Public Utilities Comm. of Ohio*, 298 U. S. 170; *Omaha Street Railway* v. *Interstate Commerce Commission*, 230 U. S. 324. The receiver of the Reading Railroad is not to be deemed a "railroad company" within the meaning of a statute: *United States* v. *Harris*, 177 U. S. 305. A construction company operating a construction train is not a railroad company: *Griggs* v. *Houston*, 104 U. S. 553; *Beeson* v. *Busenbark*, 25 Pac. 48 (S. C. Kan.). A lumber company operating a plant railroad is not a railroad company: *Williams* v. *Norther Lumber Co.*, 113 Fed. 382 (C. C. W. D. Minn.); *Sisk* v. *White Oak Lumber Co.*, 14 F. 2d 552 (D. C. W. D. Va.); *J. Ray Arnold Lumber Co.* v. *Carter*, 91 Fla. 548, 108 So. 815; *McGivern* v. *Alexander & Edgar Lumber Co.*, 102 N. W. 332 (S. C. Wisc.). A steel company operating a plant railroad is not a railroad company: *Taggart* v. *Republic Iron & Steel Co.*, 141 Fed. 910 (C. C. A. 6); nor is an oil company operating such a railroad a railroad company:

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[24] *Supra*, p. 92.

Humble Oil & Ref. Co. v. *Hamer*, 167 S. W. 2d 272 (Ct. Civ. App. Texas); nor a phosphate company operating such a railroad: *Taylor* v. *Prairie Pebble Phosphate Co.*, 61 Fla. 455, 54 So. 904.

It is at least doubtful whether the South Buffalo itself is a railroad company within the contemplation of the Interstate Commerce Act. Ordinarily at least, that term is applied only to railroads performing general transportation. Thus all the Reports of Statistics of Railways in the United States, published annually by the Interstate Commerce Commission, refer to "steam railways", to "line-haul railways", to "Class I steam railways" etc. in classifying railroad companies engaged in general transportation[25] but have never used that term in classifying switching and terminal roads, which they uniformly characterize as "Switching and terminal companies."[26]

In *United States* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383 (1911), this Court held that while the unification of terminal companies to form the defendant Association[27] might under certain conditions violate the Sherman Act, it was not a combination of competing railroad companies,[28] saying (pp. 401-402):

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[25]As, see 24th Annual Report (for 1911), all page headings, and pages 9, 11, 12; 59th Annual Report (1945), all page headings, pages IX, X.

[26]24th Annual Report, pp. 723, 733, and so classifying South Buffalo (pp. 726, 736); 59th Annual Report (1945), pp. 575, 577, and so classifying South Buffalo, p. 580.

[27]Terminal Railroad Association of St. Louis is a "terminal company", classified "S-3": 59th Annual Report, I. C. C., p. 583.

[28]This Court's decision followed *State* v. *Terminal R. R. Association*, 182 Missouri 284, 81 S. W. 395 (1904), an action against the same defendants under a state statute forbidding the combining of parallel and competing railroads. This Court said concerning that decision:

> "We are not unmindful of the essential difference between terminal systems properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines, and in the collection and distribution of traffic. * * *"

A street railway company is ordinarily held not to be a railroad company within the meaning of the statutes: *Omaha Street Railway* v. *Interstate Commerce Commission, supra,* 230 U. S. 324; *Massachusetts Loan & Trust Co.* v. *Hamilton,* 88 Fed. 588; *Williams* v. *City Electric Street Railway Co.,* 41 Fed. 556 (C. C., Ark.). Those decisions, like the decision in the *Terminal Railroad Association of St. Louis* case, are based upon the limited types of services and facilities provided by such companies.

The South Buffalo does not "transport" commodities from one state to another. It does not do so in fact. Its railroad line does not extend beyond the Buffalo Switching District, and its crews and equipment do not move outside such District.[29] Nor does it do so in contemplation of law as, indeed, the Government's own authorities show. The reason is that the South Buffalo, like all terminal switching railroads, performs its services (in so far, at least, as they relate

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> "The Missouri court held that the merger of mere railway terminals used to facilitate the public convenience by the transfer of cars from one line of railway to another, and instrumentalities for the distribution or gathering of traffic, freight or passenger, among scattered industries, or to different business centers of a great city, were not properly railroad companies within the reasonable meaning of the statutes forbidding combinations between competing or parallel lines of railroad. * * *"

[29] The Government so concedes, in substance; brief, pp. 9-10.

to interstate transportation) as agent for the line-haul railroads. Terminal railroads do not, and the South Buffalo does not participate in the interstate transportation, though their services relate to it. Nor do such roads, nor does the South Buffalo file or concur in tariffs providing for joint routes or through rates, nor do they, nor does South Buffalo receive a division of the through rate from the line-haul railroads. Its and their tariffs provide only for a fixed sum for terminal switching, which is paid by the line-haul railroads for services rendered to them (*supra*, p. 110-111).

The status of terminal switching roads with respect to the line-haul railroads and to interstate transportation was under consideration by the Commission in *Re Allowances to Kanawha, Glen Jean & Eastern Ry. Co.*, 41 I. C. C. 53, which the Government cites at page 68 of its brief as disclosing "the line of demarcation between the Commodities Clause and the Shippers' Allowance Clause for present purposes * * *". The stock of the Kanawha, Glen Jean & Eastern and the stock of a coal mine which it served[30] was owned by the same persons, members of the same family, and the two companies had the same officers (p. 56). The Commission declared that (p. 59):

> "The Glen Jean has an indirect interest in the coal company coal which it transports, for the reason that the two companies have the same controlling stockholders, the same executive and managing officers, and are conducted with little regard for the legal distinction between them. * * *"

None the less the Commission sanctioned joint rate arrangements between the Glen Jean and two line-haul railroads

[30]It served, also, some coal mines owned by independent interests (p. 56).

(p. 61). In doing so, it commented upon the Commodities Clause and the Shippers Allowance Clause, and their relation to the service in connection with interstate transportation rendered by the Kanawha & Glen Jean as follows (p. 59):

> "The commodities clause forbids common carriers by railroad to transport any articles or commodities, other than timber and the manufactured products thereof and company material, which they own; or in which they have any interest, direct or indirect; or manufactured, mined, or produced by them, or under their authority, from which they have not genuinely dissociated themselves before the act of transportation. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366. The argument frequently is made and is made here that this provision conflicts with the provision of section 15 of the act relative to the compensation of shippers by railroads for assisting them in the service of transportation or for furnishing facilities for such service and that industrial railroads and tap lines are therefore beyond the purview of the commodities clause. The argument is fallacious. Section 15 recognizes the common-law right of railroads to perform their public duties through agents and by means of hired facilities and merely provides that the Commission may regulate the compensation paid to the agent employed or to the owner of the facility hired if the agent or the owner of the facility is also a shipper. *A., T. & S. F. Ry. Co.* v. *Kansas City Stock Yards Co.*, 33 I. C. C., 92."

Manufacturers Ry Co. v. *St. Louis, I. M. & S. Ry. Co.*, 28 I. C. C. 93, which the Government cites upon the same point, also expressly sanctions the right of an industry-

owned terminal railroad, acting as agent for a line-haul railroad, to perform terminal switching with respect to the commodities of the owner of the terminal road's stock.

While for reasons stated we do not agree that the Commodities Clause applies to terminal railroads,[31] both decisions recognize that such roads, when performing terminal services as agents for the line-haul railroads, are not within the provisions of the Commodities Clause.

The explanation of the law laid down in the Commission's two decisions, cited above, will be found in the Carmack Amendment to the Interstate Commerce Act which, like the Commodities Clause and the Shippers' Allowance Clause, came into the Act as a part of the Hepburn Bill in June 1906 (34 Stat. 595; 49 U. S. Code § 20(11)), and in the case-law previously existing, which, in large measure, it displaced. Under the law as it stood prior to the Carmack Amendment, a carrier, in the absence of legislation or of an express contract, "is only bound to carry over its own line and then deliver to a connecting carrier," which then became "the agent of the shipper." *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 196,[32] 197. That Amendment, which bears striking resemblance to the Commodities Clause

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[31]The expression used in the opinion is "industrial railroads and tap lines", which may or may not be terminal railroads.

[32]This Court said (219 U. S., at p. 196):

> "Independently of the Carmack amendment the carrier, when tendered property for such transportation, might elect to contract to carry to destination, in which case it necessarily agreed to do so through the agency of other and independent carriers in the line; or, it might elect to carry safely over its own lines only and then deliver to the next carrier, who would then become the agent of the shipper. * * *"

in its language and structure, requires "any common carrier, railroad, or transportation company", subject to the Chapter, receiving property for transportation from one state to another, to issue a receipt or bill of lading therefor, and to be liable to the lawful holder thereof for any damage to such property caused either by it or by any carrier to which it might deliver such property for further transportation.[23] By a subsequent amendment, such liability was extended to "any common carrier, railroad or transportation company delivering said property so received and transported * * *." In *Galveston, H. S. & A. Ry. Co.* v. *Wallace*, 223 U. S. 481, 491-492, this Court said concerning the Amendment, as enacted in 1906:

> "Under the Carmack amendment, as already construed in the *Riverside Mills Case*, wherever the carrier voluntarily accepts goods for shipment to a point on another line in another State, it is conclusively treated as having made a through contract. It thereby elected to treat the connecting carriers as its agents, for all purposes of transportation and delivery. * * *"

But terminal railroads are not within the Carmack amendment. They are not required to issue receipts or bills

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[23]The relevant provisions of 49 U. S. C. § 20(11) as enacted in 1906, 34 Stat. 595, are as follows:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass * * *."

of lading, and in most cases do not do so.[34] Further, this Court has held that even a line-haul railroad, if it performs only terminal switching for another line-haul railroad in delivering a particular shipment is not the delivering carrier with respect to such shipment, but that the last railroad company performing line-haul transportation with respect to such shipment is the railroad company delivering said property, within the meaning of that Amendment. *Missouri Pacific* v. *Reynolds-Davis Grocery Co.*, 268 U. S. 366.[35]

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[34] So, for example, in the *Industrial Railways Case*, 29 I. C. C. 212, decided in 1914, involving some 20 incorporated industrial railroads including the South Buffalo, the Commission notes (p. 227) that "only one issues bills of lading * * *." In *United States* v. *Brooklyn Eastern District Terminal*, 249 U. S. 296 (decided 1918), the opinion points out (p. 302) that the Terminal does not issue its bill of lading. In *United States* v. *Union Stockyard and Chicago Junction Railway*, 226 U. S. 286 (decided 1912), this Court comments (p. 304) "that neither the Junction Company nor the Stock Yard Company issues through bills of lading". Testimony in the present case shows that the Buffalo Creek Railroad issues no bills of lading (R. 640). All of these terminal roads were incorporated common carrier railroad companies.

[35] The Court said (pp. 368-369, unanimous):

> "The joint through rate covered delivery at the warehouse of the consignee. The bill of lading named Morgan's Louisiana & Texas Railroad and Steamship Company as the initial carrier and the route designated therein named the Missouri Pacific as the last of the connecting carriers. Its lines enter Fort Smith but do not extent to the consignee's warehouse. It employed the Saint Louis-San Francisco to perform the necessary switching service. And it paid therefor $6.30, the charge fixed by the tariff on file with the Interstate Commerce Commission. The switching carrier was not named in the bill of lading and did not receive any part of the joint through rate. It was simply the agent of the Missouri Pacific for the purpose of delivery. The Missouri Pacific was the delivering carrier and is liable as such."

The Carmack Amendment is important in this action for two reasons. First, as a statutory provision which, like the Commodities Clause, came into the law as a part of the Hepburn Amendment, and which is substantially identical in its provisions with the Commodities Clause, the construction placed upon it must apply also to the Commodities Clause. The Carmack Amendment does not reach terminal switching, whether performed by a line-haul railroad or by a terminal railroad. Second, the history of the Carmack Amendment and the construction placed upon it show that terminal switching services are not "transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country * * *" (Carmack Amendment), but are a "service connected with such transportation" (Shippers' Allowance Clause).

Except for the foregoing construction of the law the decisions of the Interstate Commerce Commission respecting the Commodities Clause and the Shippers' Allowance Clause would be incomprehensible. The Commission had never held, or intimated prior to the present case, that switching services rendered by a terminal road were within the Commodities Clause. On the contrary, for upwards of 40 years it had held that they were not, by ruling that such railroads were entitled to receive allowances from the line-haul railroads for services connected with interstate transportation: *National Malleable Castings Co.* v. *Pittsburgh & Lake Erie Railroad Company*, 51 I. C. C. 537.

Thus upon the facts shown, if the Holding Company or the Steel Company, acting directly or through the South Buffalo, renders terminal switching services for the line-

haul railroads those services fall within the express provisions of the Shippers' Allowance Clause, and exactly within the construction placed upon it by this Court in the *Baltimore & Ohio Railroad* case and by the Commission in *National Malleable Castings Co.* v. *Pittsburgh & Lake Erie Railroad Company, supra,* 51 I. C. C. 537.[36] And if, on the other hand, the South Buffalo performs such terminal switching services for the line-haul railroads those services are lawfully performed within the Commission's decisions cited in the preceding paragraphs, including those cited by the Government, and within the very interpretation which the Government places upon the two statutes. In either view the service is lawful, and the Commodities Clause does not apply to it.

The entire history of Commodities Clause legislation before Congress evidences the intent of that body to limit its operation to railroad companies, engaged in general interstate transportation.

When the proposed Clause was under debate in the Senate in 1906, its purpose was stated by Senator Elkins, its sponsor, to be "to prohibit interstate roads, carriers of

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[36] In *National Malleable Castings Co.* v. *Pittsburgh & Lake Erie Railroad Company et al.*, 51 I. C. C. 537, the Commission, after referring to this Court's affirmance of the Commission's determination that points within the Los Angeles switching district upon industrial spur tracks, up to seven miles from the main tracks of the line-haul railroads, were properly regarded as part of such railroads' terminal facilities, said (p. 541):

> "In numerous cases subsequently decided we have fixed reasonable allowances for switching to and from the tracks of the line-haul carriers performed by the industry itself either directly or through a common-carrier industrial line and in many instances the character of the switching was similar to that performed by the present complainant. * * *"

interstate commerce, from engaging in or doing any other business than the transportation of freight and passengers".[37] In the debate which ensued objections were made to it by senators who feared that its aplication to short line roads, pipe lines and water carriers would unnecessarily disrupt industry and retard national development. It was pointed out repeatedly in the course of the debate that industry-owned short line railroads were essential in the case of coal industries, iron, steel and copper industries, lumber industries and many others[38] to enable such industries to reach the trunk line railroads, that most of those small railroads performed some general carrier business for the public, and that there was no evidence that their operation had produced the injuries which the Clause was intended to remedy. It was pointed out without contradiction during the debate that the proposed Clause "would not touch the

[37] 40 Cong. R. 6456.

[38] 40 Cong. R. 6460, 6496, 6499, 6563-6565, 6567, 7012-7013. Senator Fulton said (40 Cong. R. 6567):

> "It is my conviction that legislation of this character should be directed against those transportation lines only that are engaged principally in carrying interstate commerce, and with which mining or other enterprises are merely incidental. It ought not to be applicable to those carriers with whom railroading is merely incidental to the business of their mills or mines. * * *"

And Senator McLaurin, a member of the Committee on Interstate Commerce, later stated the same thought as seeming to be the desire of the Senate (40 Cong. R. 7013):

> "It seems to be the desire of the Senate to prohibit common carriers, whose principal business is common carrying, from engaging in the business of mining, but not to prohibit producers from providing their own means of transportation for their own freight when they make the transportation business incidental to their main business. * * *"

ownership of railroads by coal companies or the common ownership of railroad companies and coal companies."[39] Almost the last statement made by Senator Elkins in the course of the debate was that "if these logging roads are owned by lumber companies and incidental to their business the law would not apply to them; or, * * * if these are intrastate logging roads or private roads they do not come under the operation of the law. * * *"[40] That statement was made prior to the time that the exception in the Commodities Clause with respect to timber and the manufactured products thereof was proposed and adopted by the Senate.[41]

When the proposed Clause was first passed by the Senate as an amendment to the Hepburn Bill it did not contain the quoted expression "railroad company", but, instead, the expression "common carrier."[42] The House of Representatives, however, refused to agree to the proposed amendment (the Commodities Clause) so long as that expression ("common carrier") remained in it. The Bill was twice sent to conference because, *inter alia*, of such disagreement.[43] Finally, the Senate agreed to the substitution of "railroad company" for "common carrier"[44] and the Bill, with the

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[39]40 Cong. R. 7011-7012. As we have pointed out (*supra*, p. 31 *et-seq.*) two amendments intended to eliminate that objection were defeated.

[40]40 Cong. R. 7013.

[41]See 40 Cong. R. 7015.

[42]40 Cong. R. 6561, 6569-6570, 7088.

[43]House Report 5003; Amendment numbered 5; House Report 5076, Amendment numbered 5: all 59th Cong., 1st Session; 40 Cong. R. 9577. The bill was sent to conference three times in all. The reports of the first conference recommended some changes in the Commodities Clause adopted by the Senate but did not refer to the expression, "common carrier"—see Senate Document 476 and House Report 4659, Amendment numbered 5, both 59th Congress, 1st Session.

[44]40 Cong. R. 9641, 9655.

Commodities Clause in that form, was passed and approved, and became law.

When the proposed Water Carrier Act, 1935 (now substantially Interstate Commerce Act, Part III) was submitted to Congress by Federal Coordinator of Transportation Eastman, it contained a proposed commodities clause.[45] Hearings were held on the resulting Bill (S. 1632, 74th Congress, 1st Session) by the Committee on Interstate Commerce of the Senate, in the course of which so much opposition developed to such extension of the Commodities Clause that it was dropped when the Bill was reported out of Committee.[46] The proposed Motor Carrier Act, 1935, submitted to Congress at the same time by Coordinator Eastman contained no Commodities Clause and none was added in the course of its passage by Congress.[47]

Again when the bill which was to become the Transportation Act of 1940 was under consideration by Congress the proposal was made, both in the Senate and in the House

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[45]See Report of Federal Coordinator of Transportation dated March 10, 1934, being Senate Document 152, 73rd Congress, 2nd Session, Appendix F, Sec. 214, and Report of Federal Coordinator of Transportation dated January 21, 1935, being House Document 89, 74th Congress, 1st Session, Appendix VI, Sec. 214.

[46]Testimony of Commissioner Eastman, Hearings in April, 1939, before the Committee on Interstate Commerce of the Senate on S. 2009, 76th Congress, 1st Session, entitled Transportation Act of 1939, at page 772; see also Senate Report 925, 74th Congress, 1st Session, p. 3.

[47]Senate Document 152, *supra*, Appendix G. The Coordinator reported that it seemed desirable to await the results of the regulation which he proposed before imposing further restraints upon the transportation of proprietary tonnage. Senate Document 152, p. 49. See also House Document 89, *supra*, Appendix VII. The citation for the Motor Carrier Act, 1935, is 49 Stat. 543.

of Representatives, to amend the language of the Commodities Clause so as to render it applicable to all common carriers. Section 12 (being the proposed revised Commodities Clause) of the Transportation Bill, as drafted by the Committee of Six and submitted to the House Committee on Interstate and Foreign Commerce,[48] and as by that Committee originally submitted to the House of Representatives,[49] provided that "It shall be unlawful for any carrier by railroad and, on and after January 1, 1941, it shall be unlawful for any carrier" to transport its own commodities. Although hearings were held on the Bill through March, 1939,[50] it seems never to have been reported out by the Committee.

The bill originally considered by the Senate Committee on Interstate Commerce, which was the bill proposed by the Committee of Six with certain changes, contained, as Section 12, a proposed Commodities Clause identical with the one submitted in the House of Representatives.[51] Before that Committee the proposed Commodities Clause went through several revisions, applying at one time to "any common carrier subject to the provisions of this Act",[52]

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[48]Committee Print No. 1, pp. 38-39, March 1, 1939, Transportation Bill proposed by the Committee of Six, 76th Congress, 1st Session, House Committee on Interstate and Foreign Commerce.

[49]H. R. 4862 (pp. 39-40), 76th Congress, 1st Session, introduced March 8, 1939, by Chairman Lea of the House Committee on Interstate and Foreign Commerce; 84 Cong. R. 2512.

[50]Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Session, on H. R. 4862, entitled "Omnibus Transportation Bill", Vol. 2, March 7-10, 14-17, 21-24, 26, 29 and 30, 1939.

[51]Confidential Committee Print, March 15, 1939, 76th Congress, 1st Session, p. 47, sec. 12.

[52]Confidential Committee Print No. 2, March 18, 1939, p. 50, sec. 12.

and later to "any carrier by railroad and, on and after January 1, 1941, * * * any carrier, other than a carrier by air",[53] in which latter form it was first introduced in the Senate.[54] It was those proposed revisions which the Committee in its report to the Senate characterized as "far too drastic."[55]

At the hearings held by the Committee on Interstate Commerce of the Senate upon the bill (S. 2009) it was pointed out that one purpose of the redrafted Section 12 (the Commodities Clause)[56] was to avoid the decision of this Court in the *I. C. J. & E.* case.[57] The Clause in its proposed modified form was supported during the earlier

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[53]Confidential Committee Print No. 3, March 28, 1939, pp. 44-45, sec. 12.

[54]S. 2009, pp. 44-45; 76th Congress, 1st Session, March 30, 1939; 84th Cong. R. 3509.

[55]Senate Report 433, 76th Congress, 1st Session, May 16, 1939, p. 15. The record of the hearings held on S. 2009 in April, 1939, indicates that the Committee's objection rested, in part, upon the extension of the proposed Commodities Clause to cover all carriers.

[56]The Clause in the form then under consideration was as follows (see S. 2009, pp. 44-45):

> "Sec. 12. It shall be unlawful for any carrier by railroad and, on and after January 1, 1941, it shall be unlawful for any carrier, other than a carrier by air, to transport, in commerce subject to this Act, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by or under the authority of such carrier or any subsidiary, affiliate, or controlling person of such carrier, or any such article or commodity in which such carrier, subsidiary, affiliate, or controlling person has any interest, direct or indirect, legal or equitable, except such articles or commodities as may be necessary or intended for use in the conduct of the carrier business of such carrier."

[57]Committee on Interstate Commerce of the Senate, Hearings on S. 2009 (entitled "Transportation Act of 1939"), p. 309.

hearings, by Senator Reed, but was strongly criticized throughout the hearings by the Chairman of the Committee, Senator Wheeler,[58] who pointed out repeatedly that (in its proposed form) it would require modification to prevent its application to terminal roads,[59] water carriers, motor carriers, pipe line companies, contract carriers and other similar enterprises. At the hearings a great deal of testimony was offered, opposing the proposed extension of the Clause, and specifically, opposing any extension of its provisions which would bring industrial terminal roads within its control.[60] Much such testimony was not received, however,

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[58]No views were expressed by the other members of the Committee.

[59]For example, the Minutes disclose the following (pp. 67-68):

> "The Chairman. Judge, somebody called me on the phone the other day—I do not remember who it was; I think it was some newspaper man—and asked me as to whether or not in my opinion this prevented the steel company, or somebody in that position, from operating their own railroad, where they have a small railroad that they are operating. I did not intend such a result.
>
> * * * * * *
>
> "Senator Reed. I am perfectly willing that it should have that effect.
>
> "The Chairman. Well, I doubt that it should. For instance, a lumber company may own some railroad.
>
> "Senator Reed. You exempt that?
>
> "Mr. Fletcher. You exempt the lumber company?
>
> "The Chairman. Yes.
>
> "Mr. Fletcher. It might not be altogether lumber.
>
> "The Chairman. I was speaking, for instance, of some steel company or some other industrial company which might own a short railroad."

See also pp. 285-286; 427-428; 589-590.

[60]Such testimony was given by, *inter alia*, W. H. Day for the National Industrial Traffic League (pp. 285-286) and by J. M. Hood for the American Short Line Railroad Association. Mr.

because of Senator Wheeler's announcement, early in the course of the hearings, that the Commodities Clause as then enacted would not be changed. As has been pointed out, that decision was incorporated in the Committee's Report to the Senate.

Upon at least two other occasions bills intended to so amend the Commodities Clause as to render it applicable

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Day pointed out that the League had gone on record in 1933 as follows (p. 285):

> "'The development of numerous industries in the United States has been made possible through the acquisition of transportation facilities which otherwise would not have been afforded to such industries. This is peculiarly the situation in the natural-resource industries. Many manufacturing enterprises have found it necessary to acquire transportation facilities in order to enable them to more efficiently and cheaply serve the public. Where such facilities may be availed of by the public, the league believes it to be to the best public interest to permit such services to be rendered. * * *'"

Mr. Hood testified in part (p. 541):

> "It would be impossible for many communities which need rail facilities to develop raw materials or a labor market, or to take advantage of some climatic condition which permits processing of a particular nature, to provide, with the aid of those particularly interested, rail facilities.
>
> "Had this clause been before you in a serious manner I would have gone into detail on behalf of 135 common carriers by railroad, who would be directly affected by the terms of this clause. Their total mileage is 6,310; their investment in rail property is $570,000,000, and they have 31,400 employees.
>
> * * * * * *
>
> "We frequently have railroads incorporated and organized to operate a branch line which has been abandoned by a trunk line. Invariably the investors in that newly organized property are the people whose private businesses are threatened with elimination through the lack of rail facilities."

to "common carriers" were introduced in Congress,[61] but were not enacted.

Thus, it is submitted, the entire history of the Commodities Clause before Congress evidences the intent of that body to confine the application of the Clause strictly to the line-haul railroads, whose attempt to monopolize coal production in the areas which they served had originally brought about its enactment.

F. The opinion below.

Judge Knight overruled the respondent's arguments based upon the Shippers' Allowance Clause, holding that "The South Buffalo is a railroad company within the purview of the Commodities Clause," and that "The Commodities Clause * * * applies, though South Buffalo does not cross a state line, and whether or not it be designated as an industrial or switching railroad" (R. 922).

We have never argued that the Commodities Clause does not apply because the South Buffalo does not cross a state line. That argument was presented below by counsel for the American Short Line Railroad Association. So much of Judge Knight's opinion and of the Government's brief in this Court as relates to that subject is, from our standpoints, irrelevant, and we express no opinion concerning it.

The circumstances under which our argument respecting the Shippers' Allowance Clause was presented to the Trial Court were unforunate. It was outlined briefly in our argument at the opening of the trial (R. 67-68, 70, 75), but was not referred to by the Government. It was not referred to in the Government's first brief following

[61] S. 3079, 61st Congress, 1st Session; S. 4480, 61st Congress, 2nd Session; both 1909.

trial (that being the first brief filed in the case), but was again stated in our brief in answer. In the Government's reply brief, for the first time, it disclosed its position with respect to the argument, stating therein the contentions and authorities which appear in the Trial Court's opinion. No closing argument was had, and the respondents were thus foreclosed of any opportunity either to respond to the Government's contentions or to present their argument with knowledge as to what those contentions would be.

Although Judge Knight's opinion rests upon the law and not upon the facts, his attempt to reconcile his view of the law with the facts proven involved him in substantial difficulties. Thus we find him stating at one time that (R. 896) "The corporate distinction between the two companies (the South Buffalo and the Steel Company) is in no way dissolved, and this is not changed though the physical and operational aspects in a [sic] case may seem to be commingled." Later he speaks of (R. 904) "the commingling of the identity and community of interest between the three" appellees as giving the South Buffalo an interest in the Steel Company's property. Thus it seems that corporate identity was commingled but in no way dissolved, and that while "physical and operational aspects" only seemed commingled under one statute they resulted in "identity and community of interest" under the other. In spite of such "commingling of the identity and community of interest" sufficient to give each appellee an interest in the property of the other two, the Judge thought that "The theory of merger into one entity of the three defendant companies as 'owner of property' * * * is chimerical" (R. 896). The multitudinous and conflicting aspects thus assumed by the same interests and transactions, disclosed by

the same evidence, well illustrates the inconsistencies in which the Judge's theories involved him.

Upon the law, the opinion expresses the following major lines of thought:

That this Court disapproved a somewhat similar argument in the *E. J. & E.* case, and overruled such an argument in the *Delaware & Hudson* case.

That the purpose of the Commodities Clause was to divorce transportation from production, and that its application is as broad as the Interstate Commerce Act.

That the Shippers' Allowance Clause does not apply to a common carrier because, such a carrier being an entity distinct from the owner of its stock, there is no union of transportation and production.

That the South Buffalo is more than a terminal switching railroad because it is more than a railroad plant facility of the Steel Company.

The Judge also referred to the Carmack Amendment, a statute similar to the Commodities Clause, and to the *Kanawha, Glen Jean & Eastern Railroad* case, but without noting that such Amendment did not apply to switching roads and services, and that the Commission, in the *Kanawha* case, did not deem the Commodities Clause applicable to a terminal switching road servicing the commodities of its affiliated coal industry as agent for a line-haul railroad.

We believe that all the grounds stated in the opinion have been refuted. Specifically, we have pointed out that it was not the purpose of Congress in enacting the Hepburn Amendment, or the Commodities Clause as a part of it, to divorce production from transportation at the level of terminal services (pp. 92-96), and largely for that reason, that the Commodities Clause does not apply to all trans-

portation services which are a part of interstate commerce (pp. 104-107). We have shown, also, that our argument was not presented and, in view of the facts, that it could not have been passed upon in the *Delaware & Hudson* case or the *E. J. & E.* case, and that the argument in the latter case to which Judge Knight's opinion refers was accepted by the District Court, and was not referred to by this Court (pp. 98-100). The assumption that this Court, by failing to refer to the District Court's determination, intended to disapprove it,[62] is notable more for its novelty than for its logic.

The view that the South Buffalo is not an industrially owned switching railroad is insupportable. If it is not industrially owned the Commodities Clause cannot apply to it. Repeated classifications by the Interstate Commerce Commission show that it is a terminal switching railroad. The view that it is not a switching railroad because it is "more than a terminal facility" is inconsistent with all the classifications of switching and terminal companies issued by the Commission. The great majority of those companies were separately incorporated common carriers, having all the attributes possessed by the South Buffalo, and all the attributes referred to in Judge Knight's opinion.[63]

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[62]The District Court's determination of the point of law presented, unless disapproved, would constitute *res judicata* as to such point in any future litigation between the parties to that action.

[63]In this connection we note that Judge Knight's view that there are essential differences between the Terminal Railroad Association of St. Louis and the South Buffalo (cf. *United States* v. *Terminal Association*, 224 U. S. 383) is not shared by the Commission, which classifies both as terminal switching companies. The Commission classifies the South Buffalo as S-1, meaning "companies * * * performing switching service only", and the Terminal Railroad Association of St. Louis as S-3, meaning a company performing "both switching and terminal" services."

Judge Knight's statement that "the Shippers' Allowance Clause * * * has no application to a common carrier" because it involves "allowances made to the shipper for services furnished * * * by the shipper" was supported by the Government in the District Court, by the citation of *Manufacturers Railway Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 28 I. C. C. 93,[64] which the Judge cites later in his opinion, and which the Government now cites in its brief to this Court upon this point (Br., p. 115). The stock of Manufacturers' Railway was owned by the stockholders of Anheuser-Busch Brewing Company, which was the principal industry served by that Railway. The Commission's opinion discloses that the line-haul railroads were paying allowances to the Railway for switching interstate shipments (p. 100) to and from the Brewery's plant, and had done so for many years. Thus the value of the decision from the Government's standpoint in this case under the Commodities Clause is altogether on the negative side, since that Railway did, without objection from the Commission, precisely what the South Buffalo is doing. The substance of the language from the Commission's opinion, which was quoted to the Court below, and which is quoted to this Court, is that when an industry incorporates a terminal railroad which is thereafter independently operated, a trunk line may not pay the owning industry an allowance under the Shippers' Allowance Clause for service performed by the railway, since the owning industry does not perform those services.[65] The Commission's determina-

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[64]Reviewed by this Court and affirmed: *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457.

[65]It is not clear that this is true, since the industry might hire and pay the railway to perform the switching as the industry's agent, and recoup the cost from the line-haul road. *Texas & Pacific Ry. Co.*, 288 Fed. 167, 169 (C. C. A. 5).

tion, however, rests upon two assumptions, both of which the Government contradicts in this case: "Assuming the newly made carrier to be under the law a common carrier in all respects such as it represents itself to be," that is, "wholly separate and distinct from the owning industry"; and that "the railway is no longer a part of or in law connected with" the industry (pp. 101-102; see Gov't. Br., p. 116). That, absent those assumptions, the Commission would have reached the opposite conclusion, is clear.

Lastly, Judge Knight, cites *Powell* v. *United States*, 112 F. (2d) 764 (C. C. A. 4) as involving a construction of Section 1 of the Elkins Act, 49 U. S. C., section 41(3), the language of which is stated to be similar to the language of the Commodities Clause. The citation is irrelevant to our contentions, as relating to the Trial Court's determination that the Commodities Clause may apply to a railroad which does not cross state lines. However, the *Powell* case was not decided under paragraph 3 of section 41, but under paragraph 1 thereof,[66] which contains no language bearing any resemblance to the Commodities Clause.

The citation of such grounds and authorities by the Trial Court in overruling our point proves only one fact—that he completely misunderstood it.

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[66] Paragraph 1 is a criminal provision directed against carriers. Paragraph 3 is a civil provision directed against shippers. *Powell* v. *United States* was a criminal case, brought against the receivers of the Seaboard Air Line.

CONCLUSION

For the reasons stated herein it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

BRUCE BROMLEY,
Attorney for Appellees.

HOYT A. MOORE,
BRUCE BROMLEY,
GEORGE M. BILLINGS,
FRANK M. MCGARRY.